

No. 1

05-767 DEC 7 - 2005

In The OFFICE OF THE CLERK  
Supreme Court of the United States

————— ♦ —————  
BRETT A. BURSEY,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

————— ♦ —————  
ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

————— ♦ —————  
PETITION FOR WRIT OF CERTIORARI  
WITH APPENDIX

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## QUESTIONS PRESENTED

In an effort to stifle peaceful protest against the President, the federal government has turned to a three decade old statute that was never intended for this purpose and has never been used for a criminal prosecution. This is the first appellate case to raise the central issues about the construction and constitutionality of this easily abused statute, specifically:

1. In light of the plain language of the statute and the cannon of Constitutional avoidance, should the court construe that 1752(a)(1) requires secure areas to be plainly marked by ropes, signs, or some other similar device?
2. Do the First and Fourteenth Amendments prohibit government officials from declaring a hundred acres of public roads and public lands off limits to those who seek to peacefully protest the policies of the President, while allowing others to enter, remain in and pass through the unmarked restricted area?
3. Do the First and Fourteenth Amendments permit the federal government to leave decisions as to the size, contours, and rules for access to secure areas to the standardless and unfettered discretion of individual Secret Service officers?

## **PARTIES TO THE PROCEEDING**

The following party was the Defendant-Appellant below and is the Petitioner before this Court: Mr. Brett Bursey.

The following party was the Plaintiff-Appellee below and is the Respondent before this Court: the United States of America.

There is no corporation that is a party to this case.

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## PETITION FOR WRIT OF CERTIORARI

The Petitioner, Brett A. Bursey, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fourth Circuit and the United States District Court for the District of South Carolina, entered respectively on July 25, 2005 and January 6, 2004.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit that gives rise to this petition is reported at *United States v. Bursey*, 416 F.3d 301 (4th Cir. 2005). For the Court's convenience, it is reprinted at Appendix 1. The orders denying the petitions for reconsideration and rehearing *en banc* are unreported, and are reprinted at Appendix 64.

The opinion of the United States District Court for the District of South Carolina, filed on September 14, 2004, is unreported and is reprinted at Appendix 16-17 and 18-46. The order and verdict of the Magistrate Judge of the United States District Court for the District of South Carolina, entered on January 6, 2004, is unreported and is reprinted at Appendix 47.

## STATEMENT OF JURISDICTION

The State of South Carolina, having failed in its attempt to charge Petitioner Brett Bursey with criminal trespass, Defendant Brett Bursey was charged with an offense against the laws of the United States. On January 6, 2004, the Magistrate Judge entered a verdict

and opinion resulting in the conviction of Defendant. Jurisdiction arose in the District Court pursuant to 18 U.S.C. § 3231. A timely appeal was taken from defendant's conviction before the Magistrate Judge pursuant to 18 U.S.C. § 3402.

The District Court Judge affirmed the conviction by judgment dated September 14, 2004 (Appendix 16) and a timely notice of appeal was filed on September 24, 2004. (Appendix 66). The Fourth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C § 1291, and granted review. The Fourth Circuit affirmed the judgment of the District Court and a timely motion for Rehearing and Rehearing *En Banc* was filed by the Petitioner. The Petition was denied on September 8, 2005. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of the Petition for Rehearing and Rehearing *En Banc*. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

#### **CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED IN THIS CASE**

This case involves the First Amendment and Fourteenth Amendment to the United States Constitution, as well as Title 18 U.S.C. § 1752(a)(1)(ii), which provides, in relevant part:

- (a) It shall be unlawful for any person or group of persons —
- (b) Willfully and knowingly to enter or remain in

ii. Any posted, cordoned off, or otherwise restricted area of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting,

in violation of the regulations governing ingress or egress thereto[.]

This case also involves the implementing regulations of the aforementioned statute, 31 C.F.R. § 408.3, which state in relevant part:

(a) For the purposes of 18 U.S.C. § 1752 (84 Stat. 1891, 96 Stat. 1451), ingress or egress to or from...any posted, cordoned off, or otherwise restricted areas of a building or grounds where the President or other person protected by the United States Secret Service is or will be visiting is authorized only for the following persons:

(1) Invitees: Persons invited by or having appointments with the protectee, the protectee's family, or members of the protectee's staff;[...]

(b) Authorized persons must possess and display identification documents issued by or satisfactory to the United States Secret Service.



(c) Unauthorized entry is prohibited.

(d) The term "protectee" as used in this rule includes the President and any other person receiving protection from the United States Secret Service as provided by law.

## STATEMENT OF THE CASE

### A. Statement of Facts

On October 24, 2002, the President of the United States visited Columbia, South Carolina, for a rally being held in a hanger located at the airport. In advance of the President's trip, the Secret Service had defined what it called a "restricted area" around the site of the visit. That area extended approximately 100 yards on either side of the hanger and approximately  $\frac{1}{2}$  mile away from the hanger. (Appendix 82-83). There were, however, no cordons, barriers or other indicia of a boundary surrounding this area. (Judge Magistrate Order and Verdict Appendix 47-63). According to the site agent for the Secret Service, this area was "restricted" from 7:30 in the morning until the President left the rally. (Appendix 73-74). Nonetheless, from 7:30 until shortly before the President's arrival at approximately noon, vehicles were permitted to traverse the roads and pedestrians were allowed to walk freely through the area. The Secret Service's policy was, according to their testimony at trial, that while people could pass through the "restricted" area (Appendix 73-74), no one other than ticket holders was supposed to come into this area and "remain in or, in

effect, 'hang out' in the area." (Cohen Appendix 77-78). *It was stipulated at trial that tickets for the event were taken at the door of the venue (Cohen Appendix 71-72) and that numerous unscreened citizens were in the immediate area at the time and place the petitioner was arrested (Abel Appendix 91).*

Petitioner, Mr. Brett Bursey, arrived at the airport for the purpose of protesting the President's policies. Mr. Bursey, carrying a sign and a megaphone, walked to a grassy area on the side of Airport Boulevard approximately 500 feet from the entrance to the hanger (Gov. Exhibit 1: aerial photograph not included, Fourth Circuit Joint Appendix 681). When he was advised that he could not remain in that location, Mr. Bursey crossed the street diagonally to the far corner of the intersection across from the hanger. He was advised that he could not remain in that location either and that he would have to leave the area. Special Agent Abel told Mr. Bursey that if he wanted to demonstrate, the only place he could do so was the designated demonstration area (Abel Appendix 88-89) approximately one-half-mile away. (Cohen Appendix 72-73). When Mr. Bursey did not leave, Agent Abel contacted the airport police and asked them to arrest Mr. Bursey (Abel Appendix 93-94).

Several people joined Mr. Bursey and were also told they had to go to the demonstration area or be arrested. At this point, Mr. Bursey was holding a poster board sign that said: "No more war for oil, don't invade Iraq." Mr. Bursey was approached by Metropolitan Airport Sergeant Campbell and told to go to the demonstration area or be arrested (Campbell

Appendix 99). Mr. Bursey then asked what he would be arrested for and he was told "for trespassing." (Campbell Appendix 99). Mr. Bursey was unaware of any law making him liable for entering or remaining in a restricted area, and unaware that the area in question was federally restricted. (Bursey Appendix 114-115). Mr. Bursey refused to leave and was arrested on state charges of trespass after notice.

The trespass charges were dismissed when the airport police realized that a trespass charge could not be prosecuted given that Mr. Bursey was arrested on public property. (Campbell Appendix 100-103). Four and a half months later, and concurrent with the dismissal of state charges, Mr. Bursey was charged in a one-count information that he "knowingly and willfully did enter and remain in and on grounds...which was then a posted, cordoned off and restricted area where the President of the United States was temporarily visiting, in violation of the regulations governing ingress and egress thereto" in violation of Title 18 United States Code, Section 1752(a)(1)(ii).

## **B. Conflicting Evidence and Findings of Fact**

Mr. Bursey was tried before United States Magistrate Judge Bristow on November 12 and 13, 2003. A judgment of conviction was entered on January 6, 2004 and Mr. Bursey was sentenced to pay a \$500.00 fine and Special Assessment of \$10.00. In part, the Magistrate found that law enforcement officers were stationed at the perimeters of the alleged "restricted area" and were patrolling the area inside. Moreover, the Magistrate found that there were no

barriers or other indicia of a boundary surrounding the area. The court also determined that Mr. Bursey was in a restricted area as defined by the statute at the time of his arrest. Finally, the Magistrate found that no evidence showed that any other persons, either supporting the President or opposing him, were allowed to remain in the area around the hanger for the purpose of demonstrating *upon the President's arrival*. (Magistrate Order and Verdict) The court, however, *did not* make a finding "as to the precise time of Mr. Bursey's arrest in relation to the time of the shut down," as conflicting testimony was present in the record. (4CCA Judgment).

On January 13, 2004, a Notice of Appeal was filed with the District Court which rendered its Judgment Affirming Conviction on September 14, 2004. Although the District Court determined that no specific finding was made by the Magistrate on the precise time of Mr. Bursey's arrest, the District Court nevertheless determined that at the time of Mr. Bursey's arrest the restricted area had been "shut down." (Order on Appeal). This terminology, which constituted a new factual determination, was not used by the Magistrate, nor found in the language of the statute or regulations. A Notice of Appeal was filed with the Fourth Circuit Court of Appeals on September 14, 2004. On July 25, 2005, the Fourth Circuit Panel affirmed the District Court's judgment, finding that the boundaries of the restricted area were visibly marked in light of the fact that officers were stationed along the perimeters of the area. The Fourth Circuit also determined that "the area was restricted to all but authorized persons, as provided for in the Regulations, at the time of his

arrest," and affirmed the District Court's determination that the restricted area had been "shut down." (4CCA Judgment). No such finding was made by the Magistrate Judge. Nor could such a finding be made consistent with any fair reading of the record.

## REASONS FOR GRANTING THE WRIT

### I.

**THIS CASE ALLOWS THE COURT TO ESTABLISH THAT PUBLIC AREAS WHERE FIRST AMENDMENT RIGHTS ARE RESTRICTED FOR THE SECURITY OF THE PRESIDENT, MUST BE CLEARLY MARKED AND ENTRANCE RESTRICTED, SO AS TO AVOID VIOLATING FIRST AND FOURTEENTH AMENDMENT RIGHTS TO FREE SPEECH AND DUE PROCESS**

Carefully balancing presidential security with the right to engage in political dissent is truly a task of exceptional importance. Concerns that government officials may selectively and discriminatorily enforce "restricted areas" at the request of the Secret Service are not hypothetical or limited to this case. (*See, e.g.,* Michigan case: Appendix 135; Philadelphia case: Appendix 120-126; Pittsburgh case Appendix 127-131; St. Petersburg case: Appendix 132-134). In virtually all of several recent cases, protesters who refused to go to a designated free speech zone were charged with trespass, disorderly conduct, and the like, however, most charges were later dismissed. Thus, while the

Court must necessarily rule on the facts of this case and the statute at issue here, these other incidents demonstrate the importance of determining the limits on the government's power to restrict the exercise of free speech in the name of security.

- A. The restriction imposed upon Petitioner's First Amendment right to free speech and lawful assembly was not narrowly tailored to achieve the government's interest in protecting the President's safety.**

The government has the power to regulate conduct associated with First Amendment rights to speech and assembly, although the breadth of this power depends upon the designation of the forum. In balancing the government's interest in limiting the use of its property against the interests of those who wish to use the property for expressive activity, this Court has identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum. *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 572-73 (1987). Publicly owned spaces have a 'public forum' nature that imbues speech in such spaces with greater First Amendment protection, and consequently subjects any restriction to heightened scrutiny. *Id.* at 573.

In a traditional public forum, the state may enforce regulations of time, place, and manner of expression which are content-neutral, but they must be narrowly tailored to serve a significant government interest. *Jews for Jesus*, 482 U.S. at 573, citing *Perry Ed.*



*Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). The State must also leave open ample alternative channels of communication for free speech. *Id.* A state entity cannot exclude a speaker from a traditional public forum altogether unless "the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Arkansas Educational Television Commission v. Forbes*, 523 U.S. at 677, 1641.

It is undisputed that the airport premises upon which Petitioner attempted to exercise his First Amendment rights were public property, as evidenced by prior court ruling. *State v. Hanapole*, 255 S.C. 258, 267 (S.C. 1970). As a public space in which citizens have previously engaged in political protest, the airport grounds represent a traditional public forum which provided Petitioner with heightened protection of his First Amendment rights. Although Petitioner does not dispute that the security of the President constitutes a legitimate government interest, the State failed to narrowly tailor its restriction of Petitioner's right to free speech to serve this interest. The imposed restriction (i.e. the statute and regulation) was unreasonable as applied to Petitioner given the Government's failure to clearly and visibly demarcate the boundary creating the "restricted area." The District Court and Fourth Circuit ignored the Magistrate's finding "*that there were no barriers or other indicia of a boundary surrounding the area*" (emphasis added) (Magistrate Judge's Verdict), and made a factual determination that positioning of an unspecified number of officers around the perimeter who did not prohibit entry, or advise citizens they

were entering a restricted area (Agent Cohen Appendix 83-85; Rogers Appendix 104-105; Sanders Appendix 106-107; Rudolph Appendix 110-112), met the statutory requirement for public notice of a restricted area. Improperly relying on another statement from the Magistrate verdict, which was taken out of context, the Fourth Circuit concluded:

"We need not determine whether, as Bursey contends, the Statute requires a physical demarcation of a restricted area. This is because, contrary to Bursey's assertions of fact, the boundaries of this restricted area were visibly marked. Indeed, the Magistrate Judge specifically found that the law enforcement agents were stationed at the perimeters of the area." (4CCA Opinion).

Furthermore, it was clear error and distortion of the congressional intent and the plain meaning of the express language of the statute to equate "stationed" with "cordoned off." As the panel noted, "cordoned off" includes "to prevent passage". (4CCA Opinion). The same dictionary used by the panel reveals that among the many meanings of "station," none of them include preventing passage or closing off or restricting passage. Thus, the Magistrate was accurate to say officers were "stationed" at the perimeters of the so-called restricted area. It is a totally different issue as to whether ingress and egress was restricted as required by the statute and the regulation. Mr. Bursey does not challenge the finding that officers were located at intersections leading to the airport. Traffic was heavy



and officers were directing traffic and assisting with parking for the event. However, there was absolutely no testimony that officers lined the entire 100- square acres serving notice and prohibiting entry. Moreover, those officers at the intersections leading to the airport did not prevent passage and were not operating to close off, restrict, or control access as required to serve any notice that the area was restricted. Quite to the contrary, thousands of individuals in vehicles were allowed by these "stationed" officers to pass into the so-called "restricted area." After acknowledging several times that these "stationed" officers allowed access into the so-called restricted area (Appendix 73-76; 76-78), Secret Service Agent in Charge Douglas Cohen was further questioned by the Judge Magistrate on this point: Q. "And you had police officers, not necessarily Secret Service Agents, but police officers posted at what you considered to be the perimeter of what you wanted to be your restricted area?" A. "Yes" (Appendix 84) Q. "Now, but prior to the president's arrival, they weren't stopping people coming in and out, were they? Like, if a car pulls off [Highway] 302 onto Airport Boulevard, the officer down there is not stopping them?" A. "That's correct." (Appendix 84)

Mr. Bursey testified that he was standing at the main area of egress where the Fourth Circuit assumed that police were posted to insure compliance with the statute. "They (police) weren't saying 'are you ticketed, let me see your ticket. They were stopping traffic and telling pedestrians to cross, much as if you were going to a sporting event.'" (Bursey Appendix 80-81) Those officers were the ones the Magistrate was referring to when he wrote "law enforcement agents

were stationed at the perimeters of the area" and clearly those officers had not "posted, cordoned off or otherwise restricted" ingress and egress to the area as specifically required by both the statute and regulation. Therefore, it is not inconsistent to say, as the Magistrate did, that there were officers stationed at the perimeter of the area and also find "there were no boundaries or other indicia of a boundary." (Magistrate Order and Verdict).

Moreover, evidence in the record clearly indicated that officers refused to tell Mr. Bursey where the alleged restricted zone ended. During trial, when asked whether Mr. Bursey was told where the secure area ended, the agent at the site stated: "No sir. But there was no reason for us to tell him that because of the security of the president." (Baker Appendix 96-97). This testimony speaks volumes: not only was there no notice, law enforcement clearly believed concealing the boundaries was essential to security. Such lack of definition is not consistent with reasonable time, place, and manner restrictions because it fails to provide reasonable notice of the area in which First Amendment privilege is restricted.

- B. The regulation, as applied by law enforcement officials and interpreted by the lower courts, was overbroad, vague and provided unfettered discretion to law enforcement officials.**

This Court must provide guidance in interpreting what level of notice is required under 18 U.S.C. § 1752(a)(1) to create a "restricted area." If the lower courts' determinations are allowed to stand, this

statute will provide government officials with unfettered discretion to remove protesters from the sight and sound of their intended audiences. Although the government may regulate a citizen's First Amendment right to use public spaces to communicate views on national questions, this right "must not, in the guise of regulation, be abridged or denied." *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515-16 (1939). As this court cautioned in *Hague*, a law or regulation must avoid enabling a government official to refuse the free expression of speech according to her "mere opinion that such refusal will prevent" disorderly behavior or, in this case, a lack of security for the President. (307 U.S. at 516). Such unbridled discretion could allow the law and regulation to "be made the instrument of arbitrary suppression of free expression of views on national affairs." (internal citations omitted) *Id.*

A criminal law must give persons reasonable notice of what is prohibited, and must not authorize or encourage arbitrary or discriminatory enforcement, or it violates the due process clause. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). The Supreme Court has repeatedly condemned laws which are so vague as to allow for the unfettered discretion in the hands of law enforcement. See, e.g., *Morales*, 527 U.S. at 60; *Kolender v. Lawson*, 461 U.S. 352, 358-60 (1983); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965); *Cox v. Louisiana*, 379 U.S. 536, 556-57 (1965). This court must correct the lower courts' interpretation and enforcement of 18 U.S.C. § 1752(a)(1)(ii), as to do otherwise would allow the government to make ad hoc rules and "entrust lawmaking to the moment-to-moment judgment of the

policeman on his beat" that results in the suppression of free speech. *Kolender*, 461 U.S. at 360. (citations and internal quote omitted).

Understandably, among the main concerns of Congress in passing Title 18 U.S.C. § 1752(a)(1)(ii) was that the public be given adequate notice of the actual area designated by the Secret Service to be restricted. ("It is anticipated that the Secret Service will make every effort, consistent with Presidential security, to make such restricted areas known to the public." [S. Rep. No. 91-1252. 91st Cong. 2d Sess., 9 (1970): District Court Order). In fact, strict construction of this criminal statute and due regard for constitutionality prompted even the District Court below to state: "[t]he purpose of the requirements for cordoning or posting in the statute now at issue is clearly to give notice that one is entering or within a restricted area." (District Court Order).

The Fourth Circuit's determination that stationing officers at the perimeter sufficiently notified Petitioner of a "restricted area" according to 18 U.S.C. § 1752(a)(1)(ii) and its implementing regulations, ignored material facts and a fair reading of the statute. Petitioner's right to engage in political protest, as protected by the First Amendment, can only be protected by requiring that any area deemed by the Secret Service to be restricted from public access according to the statute be narrowly drawn, clearly and visibly marked. This ensures proper notice that entry is a criminal violation. The First Amendment does not permit the federal government to leave decisions as to the size, contours, and rules for access to secure areas

to the standardless and unfettered discretion of individual Secret Service officers, as demonstrated by the factual record. See, e.g. *Kolender*, 461 U.S. at 358 (of concern is the "potential for arbitrarily suppressing First Amendment activities...[as well as] the constitutional right to freedom of movement") (citations and internal quotes omitted). The District Court and Fourth Circuit's strained and erroneous interpretation of this statute gives unbridled discretion to law enforcement contrary to well established constitutional principles.

The dangerously ambiguous nature of the government's power to regulate protected speech, in contrast to the statute's requirement that any restricted area be "posted, cordoned off, or otherwise restricted," is illustrated by the Judge Magistrate's attempt to determine what would have been an unconstitutional restriction on speech at the area in question. The Judge Magistrate found that had Defendant only "chosen to keep moving *further and further away* from the hanger, and if he had still been arrested, not at the location where he was, but at a *much further* distance from the hanger, he would have had a stronger case that the Government's actions were unreasonable and therefore unconstitutional." (Judge Magistrate's Verdict). Note that the Judge Magistrate made no reference to the Defendant being inside, or outside, of the alleged restricted zone, only "further away." Petitioner testified at trial that when speaking with a Secret Service Agent, he offered to move to an area away from where he was standing, but was told he couldn't be anywhere but the free speech zone. (Abel Appendix 112-113). It was later revealed at trial that the area Mr.



Bursey had proposed to move to (Bursey Appendix 112-113) was in fact outside the alleged "restricted area," illustrating the very danger of allowing individual officers to determine the limits of free speech with little or no guidance from physical boundaries or markers. (Cohen 72-73).

The factual record also contained statements by both of the key Secret Service Agents in this case admitting that balancing security with free speech and first amendment rights was never considered as they planned and executed the events on October 24, 2002. Agent Cohen had never heard of any Secret Service policy that addressed that balance and did not know if one even existed (Cohen Appendix 78-79, 80-82). Agent Abel testified that no such discussion occurred regarding the President's visit that day or for any other presidential visit she had been a part of as an agent (Abel Appendix 87-88). Citing *Zwicker v. Koota*, 389 U.S. 241, 250 (1967), the Magistrate Judge acknowledged that "the Government may not, under the guise of performing a security function, seal off government officials from criticism or unduly restrict the First Amendment rights of citizens to engage in peaceful protest." (Judge Magistrate's Verdict). As clearly illustrated by the record, individual officers were allowed significant discretion to determine who entered and remained in the undefined restricted area, in contravention of explicit language present in the statute. This lack of clarity surely does not provide reasonable time, manner and place restrictions necessary to give notice to sufficiently avoid violating Petitioner's rights to free speech and due process.

## II.

**THIS CASE ALLOWS THE COURT TO ESTABLISH THAT FEDERAL AGENTS DO NOT HAVE THE "FLEXIBILITY" OF UNFETTERED DISCRETION WHEN ENFORCING CRIMINAL STATUTES.**

The District Court found, "There is nothing in the statute to suggest that the Secret Service can only control an area through an absolute prohibition on entry. Such an argument equates 'restricted' with 'shut down,' which is not only contrary to the **flexibility suggested by the statute** but defies common sense..." (District Court Order, emphasis added).

The cannon of strict construction of criminal statutes precludes the flexibility the District Court offers the government agents in enforcing the rule of law. The District Court disregards the statute's clear regulations that do indeed require an absolute prohibition on entry to the referenced restricted areas to all but invitees, authorized persons displaying Secret Service identification documents, and protectees (31 CFR § 408.3).

The Magistrate Judge, in deferring to the discretion of the agents on the ground, found that **"In this age of suicide bombers...the Secret Service's concern...is not only understandable, but manifestly reasonable."** (Magistrate Judge Order, emphasis added). Justice Thurgood Marshall warned in 1985 that "History teaches us that grave threats to liberty

often come in times of urgency, when constitutional rights seem too extravagant to endure."

While the Petitioner believes that strict interpretation of the statute, and its regulations, provides for both the President's security and the citizens' First and Fourteenth Amendment Rights, the Lower Courts cite perilous times, statutory flexibility and common sense as compelling reasons to yield discretion to individual federal agents. Should the statutes and regulations not afford the agents the necessary authority to protect the President, the remedy lies with Congress, not with the Courts.

The District Court's result-driven review of the evidence, which culminated in a dispositive finding that the "restricted area" had been "shut down," exceeded the courts' scope of review and violated Petitioner's rights to due process and reasonable dissent. A district court may review *de novo* only the magistrate's findings of law, and is limited to determining whether there was a sufficiency of evidence to support a conviction when reviewing a magistrate's factual determinations. *United States v. Pasquantino*, 336 F.3d 321, 332 (4th Cir. 2003). Although the district court views the evidence "in the light most favorable to the government," the district court's power of review is limited to vacating factual findings that are clearly erroneous or remanding the case for further factual determinations. *Pasquantino*, 336 F.3d at 332. A district court may not create its own findings of fact upon review of a magistrate's decision.



Since the trial court did not find as a matter of fact that the area in question was "shut down" at the time of defendant's arrest, the panel erred in upholding the conviction based on this essential fact. Mr. Bursey could not have been convicted if the area in which he chose to remain was not restricted within the statute and regulations of 18 U.S.C. § 1752(a)(1)(ii) which makes it an offense to "remain in...a restricted area...in violation of the regulations governing ingress or egress...". The area in question was not restricted within the meaning of the regulations because it was not marked so as to give notice and other people were present in the allegedly "shut down" area. Neither the court nor the Secret Service can deviate from the statute and create a restricted zone called "shut down" that fails to meet the constitutional requirements imposed by Congress, i.e., marked boundaries to give notice and exclusion to all except those authorized by the written regulation. Secret Service agents cannot, consistent with the statute and the constitution, simply select persons to allow in the so-called restricted area and eject those it wants excluded. Such selectivity invites content-based or other non-security based discrimination.

The Fourth Circuit determined that Mr. Bursey's contention on this point was without merit "because the area was restricted to all but authorized persons, as provided for in the Regulations, at the time of his arrest." (4CCA Judgment). No such finding was made by the Magistrate Judge. Nor could such a finding be made consistent with any fair reading of the record. As the panel even acknowledged, "no specific finding was

made on the precise time of Bursey's arrest in relation to the time of the shut down." (4CCA Judgment).

One of the statutory criteria for establishing restricted areas is a provision for the allowance of "invitees" to enter the restricted area. It is common practice for tickets to be issued to determine who is an "invitee" and who may enter the restricted area. The record is clear on the point that where Mr. Bursey was arrested, citizens had not been screened for tickets, and accordingly, the area was not restricted according to statute.<sup>1</sup> Secret Service Agent Cohen testified that people standing in line were "not screened (for tickets) until they come to the building." (Cohen Appendix 71-72). The District Court acknowledged this speculative exercise when it found that "pedestrians were allowed to remain in the area only if they were or **appeared to be ticket holders.**" (emphasis added) (District Court Opinion).

Though the panel noted that "there was conflicting testimony on this point," it failed to acknowledge the extent of that conflict, that the overwhelming weight of the evidence demonstrated that the area was not shut down at the time of his arrest and that the only objective evidence (including a signed written memo by Lt. Baker Appendix 116) demonstrated that Mr. Bursey was arrested before the

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<sup>1</sup> In fact, Mr. Bursey's witnesses, who were present at the time and place of his arrest, all testified that no one ever asked them for a ticket. (Rogers Appendix 105: "They did not."); (Sanders Appendix 106 "No"); "No one asked me for anything." (Rudolph Appendix 112). One witness even testified that the police officer "actually didn't tell me to leave, he told me I couldn't be there with a sign." (Rudolph Appendix 108).

area was shut down. The Judge Magistrate's order was clearly erroneous when it stated: "Defendant has presented no evidence to show that any other person...entered or remained in the restricted area with no ticket and no intention of attending the rally, and then refused to leave the restricted area when so instructed." (Judge Magistrate Order).

A number of witnesses testified that they were present in the area and observed Mr. Bursey being arrested and placed in the waiting paddy wagon. Harry Rogers testified that he saw Mr. Bursey arrested and placed in a van from across the street. (Appendix 103) Gerald Rudolph testified that he saw Mr. Bursey being arrested and placed in a paddy wagon and that "[w]hen they started arresting him, he gave me his car keys." (Appendix 109-110). Mr. Bursey testified that when he was brought to the paddy wagon there were still people present and he spoke to them. (Appendix 113-115). Indeed, Secret Service Agent Abel contradicted herself on this very question. (Compare Appendix 85-87, "when I gave him these choices, [to go home, to get in line if he had a ticket, to go to the designated demonstration area, or to be arrested]...at that point it had become restricted to everybody except law enforcement," with Appendix 89-93 acknowledging on cross-examination that when she gave him these options, at that point in time there were other people standing on the south side of Airport Boulevard, waiting in line; Agent Abel acknowledged there were "50 or less, yeah" people waiting in line at Doolittle Hanger when Mr. Bursey was arrested. (Abel Appendix 92). There is no dispute that Bursey asked why he was being arrested when there were other

people standing even closer to the hanger than he was who were not being arrested. (See Appendix 90-93, testimony of Agent Abel; Appendix 94-95, testimony of Lt. Baker). Consistent with that, Lt. Baker's signed memorandum to State Law Enforcement Division Chief Robert Stewart dated February 19, 2003 states: "Mr. Bursey asked why we weren't arresting everyone in the line waiting to go inside the event." (Appendix 116). These are the same people, previously cited as "unscreened" and who "appeared to be ticket holders," who were in the same "restricted area" as Mr. Bursey when he was arrested.

It is entirely understandable that the Secret Service would seek to be flexible in how its operations affect local events, but this flexibility must still provide sufficient notice and remain narrowly tailored so as to avoid unconstitutional levels of discretion in inhibiting free speech. Moreover, if the Secret Service wishes to be more flexible than its regulations require, for example by allowing traffic and pedestrians to travel in an area it is monitoring, it must do so consistently, and not selectively use the regulation to justify criminal prosecution. To hold otherwise would be to allow the Secret Service to restrict the area person-by-person, solely at its discretion, in contravention of the requirement that a restriction on First Amendment speech be narrowly tailored to achieve its purpose.

The lower courts erred in granting unfettered discretion to individual agents and the District Court and the Fourth Circuit engaged in result-driven fact finding in order to justify the criminal conviction, and acted outside the scope of their review in order to

affirm a conviction which violated Petitioner's First and Fourteenth Amendment rights. This Court must not allow 18 U.S.C. § 1752(a)(1) to be used by the government as a tool to violate the right to voice political dissent.

### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BRETT A. BURSEY

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## Appendix i

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Appendix 1

PUBLISHED

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

v.

BRETT A. BURSEY,  
*Defendant-Appellant.*

No. 04-4832

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DKT LIBERTY PROJECT;  
PEOPLE FOR THE AMERICAN WAY;  
NATIONAL LAWYERS' GUILD; FIRST  
AMENDMENT FOUNDATION;  
PEOPLE FOR THE ETHICAL  
TREATMENT OF ANIMALS; PEOPLE'S  
LAW OFFICE OF CHICAGO,  
*Amici Supporting Appellant.*

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Appeal from the United States District Court  
for the District of South Carolina, at Columbia.  
Cameron McGowan Currie, District Judge.  
(CR-03-309)

Argued: May 27, 2005

Decided: July 25, 2005

Before MOTZ and KING, Circuit Judges,  
and Eugene E. SILER, Jr., Senior Circuit Judge of the  
United States Court of Appeals for the Sixth Circuit,  
sitting by designation.

## Appendix 2

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Affirmed by published opinion. Judge King wrote the opinion, in which Judge Motz and Senior Judge Siler joined.

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### COUNSEL

**ARGUED:** Jeffrey E. Fogel, CENTER FOR CONSTITUTIONAL RIGHTS, New York, New York; P. Lewis Pitts, Jr., ADVOCATES FOR CHILDREN'S SERVICES, Durham, North Carolina, for Appellant. Christopher Todd Hagins, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellee. **ON BRIEF:** J. Strom Thurmond, Jr., United States Attorney, Columbia, South Carolina, for Appellee. Susan R. Podolsky, Julie M. Carpenter, JENNER & BLOCK, Washington, D.C., for Amici Curiae Supporting Appellant.

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### OPINION

KING, Circuit Judge:

Appellant Brett Bursey was convicted in early 2004 — after a bench trial conducted by a magistrate judge in the District of South Carolina — of willfully and knowingly entering and remaining in a posted, cordoned off, or otherwise restricted area where the President was temporarily visiting, in contravention of §.1752(a)(1)(ii) of Title 18 of the United States Code. See *United States v. Bursey*, No. 3:03-309 (D.S.C. Jan. 6, 2004) (the "Verdict"). Bursey's conviction was thereafter

### Appendix 3

affirmed by the district court, and he has now appealed to this Court. *See United States v. Bursey*, No. CR-03-309 (D.S.C. Sept. 14, 2004) (the "Opinion"). Bursey advances two contentions on appeal: first, he maintains that the trial court erred in finding that he was in a "restricted area" at the time of his October 2002 arrest; second, he contends that the court erred in finding that he possessed the requisite criminal intent. As explained below, we reject both of Bursey's challenges and affirm.

#### I.

##### A.

These proceedings arise from a presidential visit to Columbia, South Carolina, on October 24, 2002, for a political rally held at the Columbia airport's Doolittle Hangar. *See Verdict* at 1.<sup>1</sup> In advance of the President's trip, the Secret Service designated an area near the hangar as a restricted area. *See id.* at 12. The restricted area extended approximately 100 yards on each side of the hangar along Airport Boulevard and approximately one-half mile from the hangar toward Highway 302. *See id.* at 6.

On the day of the political rally, law enforcement officers were stationed at the perimeter of the restricted area and were patrolling inside of it, although its boundaries were not marked by physical barriers or signs. *Verdict* at 6-7. The restrictions were

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<sup>1</sup>We recite the facts in the light most favorable to the Government, as the prevailing party. *See United States v. Pasquantino*, 336 F.3d 321, 332 (4th Cir. 2003) (en banc). The Magistrate Judge made findings of fact in the Verdict, which we review for clear error. *See Fed. R. Civ. P. 52(a)*.

## Appendix 4

in effect from approximately 7:30 a.m. until the President's departure following the rally. *See id.* at 3. Vehicles and pedestrians were permitted to travel through the restricted area until shortly before the President's noon arrival, in order to accommodate commerce and to permit airport access. *See id.* at 7, 12. Vehicles were not, however, allowed to stop or remain in the area. *Id.* at 3. Pedestrians were only permitted to remain in the restricted area if they waited in line to enter Doolittle Hangar, where they were required to present tickets for the rally and pass through a security checkpoint. *See id.* Because the Republican Party of South Carolina, the rally's sponsor, had distributed approximately 7000 tickets for the presidential event, numerous persons waited in line.

After the President's plane had landed but before he arrived at Doolittle Hangar, the restricted area was "shut down," i.e., it was cleared of all vehicles and pedestrians, including ticket holders awaiting entrance to the hangar. *See Verdict* at 7, 12. Thereafter, only authorized persons, such as presidential staff, military, and law enforcement officers (all of whom wore lapel pins issued by the Secret Service), could remain in the restricted area.

### B.

Prior to the President's arrival, Bursey drove to the airport, intending to protest the war in Iraq.<sup>2</sup> After

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<sup>2</sup>Bursey had previously called the South Carolina Law Enforcement Division to advise it of his intention to protest. There is some dispute, irrelevant to this appeal, as to what was said during and following that conversation.

## Appendix 5

parking his car, Bursey walked to a grassy area near the hangar (within the restricted area), at the southeastern corner of Airport Boulevard and Lexington Drive, carrying anti-war signs and a megaphone. *See* Verdict at 4. A Secret Service Agent, Holly Abel, and a state law enforcement officer, Tamara Baker, then approached Bursey and informed him that he could not remain in the restricted area. *See id.* After some discussion, Bursey crossed diagonally to the northwestern corner of the same intersection, remaining in the restricted area. *Id.*

Law enforcement officers thereafter advised Bursey that the northwestern corner of the intersection was also restricted. *See* Verdict at 4. Moreover, Agent Abel advised Bursey that he had certain choices: (1) go home; (2) get in line if he had a ticket; (3) go to the designated demonstration area; or (4) suffer the consequences and be arrested. The officers also advised Bursey to leave the area, as he was trespassing. *See id.* at 12. Bursey, who thirty years earlier had participated in a peaceful demonstration at the same airport against President Nixon's policies in Vietnam, knew that the Supreme Court of South Carolina had thrown out trespass charges arising from that demonstration, holding that the airport was public property and that the relevant South Carolina trespass statute was inapplicable. *See South Carolina v. Hanapole*, 178 S.E.2d 247 (S.C. 1970). As a result, Bursey declined to leave the restricted area. *See* Verdict at 4, 12.

The entire confrontation between Bursey and the officers lasted twenty to twenty-five minutes. During much of that period, other individuals were in



## Appendix 6

the restricted area, many of them in line to enter Doolittle Hangar. When the officers gave Bursey a final ultimatum to depart, however, the restricted area had been shut down, and the general public (including those waiting in line) had been cleared. At that point, when Bursey refused to leave, he was arrested by airport police on a state trespass charge. That charge was later dismissed because, as Bursey had believed, the property was public and not subject to the South Carolina trespass statute.

### C.

Over four months after his arrest, on March 7, 2003, Bursey was charged by the United States Attorney in a one-count information with violating § 1752(a)(1)(ii) of Title 18 (the "Statute").<sup>3</sup> On November 12 and 13, 2003, he was tried by the Magistrate Judge in a two-day bench trial. See 18 U.S.C. § 3401 (providing magistrate judge with trial jurisdiction under certain circumstances). By the Verdict filed on January 6, 2004, Bursey was convicted and sentenced to a \$500 fine and

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<sup>3</sup>The Information alleged that, on October 24, 2002, Bursey:

knowingly and willfully did enter and remain in and on grounds located at or near Airport Boulevard and Lexington Avenue, West Columbia, South Carolina, which was then a posted, cordoned off and restricted area where the President of the United States was temporarily visiting, in violation of the regulations governing ingress and egress thereto;

All in violation of Title 18, United States Code, Section 1752(a)(1)(ii).

## Appendix 7

a \$10 special assessment. *See* Verdict at 13. On January 13, 2004, he appealed to the district court, which received briefs and conducted a September 1, 2004 hearing. *See* 18 U.S.C. § 3402 (providing appeal of right to district court from conviction by magistrate judge). On September 14, 2004, the district court issued its Opinion, affirming Bursey's conviction and sentence. *See* Opinion at 20. Bursey has appealed, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

### II.

An appellate review conducted by a district court after a bench trial before a magistrate judge is not a trial *de novo*; rather, the district court utilizes the same standards of review applied by a court of appeals in assessing a district court conviction. *See* Fed. R. Crim. P. 58(g)(2)(D). And our review of a magistrate court's trial record is governed by the same standards as was the district court's appellate review. *See United States v. Hughes*, 542 F.2d 246, 248 (5th Cir. 1976). We assess challenges to the sufficiency of the evidence by viewing it — including all reasonable inferences to be drawn therefrom — in the light most favorable to the Government. *See United States v. Pasquantino*, 336 F.3d 321, 332 (4th Cir. 2003) (*en banc*). Findings of fact made by the trial court are reviewed for clear error, and issues of law (such as the interpretation of statutes and regulations) are reviewed *de novo*. *See United States v. Leftenant*, 341 F.3d 338, 342-43 (4th Cir. 2003).

### III.

Bursey raises two contentions in this appeal. First, he asserts that the trial court erred in concluding

## Appendix 8

that he was in a restricted area at the time of his arrest. In challenging this conclusion, Bursey contends that the area was not restricted within the meaning of the Statute and its governing regulations. Second, he maintains that the trial court erred in concluding that he possessed the requisite criminal intent to commit the offense charged. We address these contentions in turn.<sup>4</sup>

### A.

In relevant part, the Statute provides that it is unlawful for any person to willfully and knowingly "enter or remain in any posted, cordoned off, or otherwise restricted area of . . . grounds where the President . . . is or will be temporarily visiting, in violation of the regulations governing ingress or egress, thereto." 18 U.S.C. § 1752(a)(1)(ii)<sup>5</sup> As directed by Congress, the Secretary of the Treasury has

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<sup>4</sup>Bursey asserted before the Magistrate Judge that the Government's prosecution was conducted in an unconstitutional manner, *i.e.*, that he was the victim of an unconstitutional selective prosecution. *See* Verdict at 5-12. Bursey abandoned that claim on appeal to the district court and has not raised it in this proceeding. Opinion at 2 & n.1. Although the constitutional propriety of this prosecution is not before us, whether Bursey should have been prosecuted is — as a general proposition — a decision reserved to the executive branch, specifically the Attorney General and the United States Attorney. And, while such decisions may be fair game for public criticism, they normally are not subject to judicial review. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("[T]he decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion.").

<sup>5</sup>The Statute was enacted in 1971, following the assassinations of President John F. Kennedy and his brother, presidential candidate Robert F. Kennedy.

## Appendix 9

promulgated regulations pursuant to the Statute, providing, in part, that "ingress or egress to or from . . . any posted, cordoned off, or otherwise restricted areas of . . . grounds where the President . . . is or will be visiting is authorized only for the following persons:" invitees, members of the President's family and staff, military and communications personnel, law enforcement personnel, and holders of easements to the property. 31 C.F.R. § 408.3(a) (the "Regulations").<sup>6</sup> In reviewing Bursey's contention, we first assess his position with respect to what constitutes a "restricted area" under the Statute. We then turn to his challenge concerning the Regulations.

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<sup>6</sup>Specifically, the Regulations provide that only the following persons are authorized to be within a restricted area:

- (1) Invitees: Persons invited by or having appointments with the protectee, the protectee's family, or members of the protectee's staff;
- (2) Members of the protectee's family and staff;
- (3) Military and Communications Personnel assigned to the Office of the President;
- (4) Federal, State, and local law enforcement personnel engaged in the performance of their official duties and other persons, whose presence is necessary to provide services or protection for the premises or persons therein;
- (5) Holders of grants of easement to the property, provided such persons or their authorized representatives show title to the grant of easement and obtain authorization from the United States Secret Service.

## Appendix 10

### 1.

Bursey maintains that the area where he was arrested was not restricted within the meaning of the Statute, because there was no physical manifestation of the area's boundaries. He contends that the Statute's terms — "any posted, cordoned off, or otherwise restricted area" — require that such an area's boundaries must be physically demarcated. In so maintaining, he relies upon the statutory construction principles of *noscitur a sociis* ("[i]t is known from its associates") and *ejusdem generis* ("[o]f the same kind, class, or nature"). *Black's Law Dictionary* 608, 1209 (4th ed. 1968). Under these canons of construction, "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." See *Wash. State Dep't of Soc. & Health Servs. v. Guardianship of Danny Keffeler*, 537 U.S. 371, 384 (2003) (internal quotations marks and alterations omitted). Applying these canons to the Statute, Bursey asserts that the term "otherwise restricted" must be construed to embrace only physical indicia of a restricted area's boundaries, much like the terms "posted" and "cordoned off." He also contends that, at the time of his arrest, there was no physical manifestation of the restricted area's boundaries, and that he thus did not violate the Statute.

We need not determine whether, as Bursey contends, the Statute requires a physical demarcation of a restricted area. This is because, contrary to Bursey's assertions of fact, the boundaries of this restricted area were visibly marked. Indeed, the Magistrate Judge specifically found that the "law



## Appendix 11

enforcement agents were stationed at the perimeters of the area." Verdict at 7. Stationing agents along an area's perimeter squarely falls within the plain meaning of the term "cordoned off," that is, "a line or series of troops or of military posts placed at intervals and enclosing an area to prevent passage" or "a barrier of any kind operating to close off, restrict, or control access." *Webster's Third New International Dictionary* 506 (1976). Pursuant thereto, the officers at the perimeters of the area were sufficient to make it a "cordoned off" and otherwise restricted area. As a result, there was no error in the trial court's ruling that the area surrounding Doolittle Hangar, in which Bursey was arrested, was a restricted area within the meaning of the Statute.<sup>7</sup>

### 2.

Bursey next contends that the trial court erred in concluding that the area was restricted within the meaning of the Regulations. See Verdict at 4. Specifically, he maintains that, because persons with and without tickets could freely enter and traverse the restricted area, and could wait in line to enter Doolittle Hangar, the area was not restricted pursuant to the Regulations, which limit access to persons such as presidential invitees, family members, and staff.

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<sup>7</sup>In his appeal, Bursey makes no contention that the Magistrate Judge's finding that law enforcement officers were stationed at the perimeters of the restricted area is clearly erroneous, or that the finding is otherwise insufficient to render the area "cordoned off" or otherwise restricted under the Statute. We thus need not address the contention of the amicus curiae that the Opinion, by not mandating visible markers of the restricted area's boundary, presents First Amendment problems.



## Appendix 12

Bursey's contention on this point is also without merit, because the area was restricted to all but authorized persons, as provided for in the Regulations, at the time of his arrest. Although there was conflicting testimony on this point, the evidence must be viewed in the light most favorable to the Government, and we can only vacate factual findings that are clearly erroneous. See *Leftenant*, 341 F.3d at 342-43; *Pasquantino*, 336 F.3d at 332. The Magistrate Judge found that once Air Force One had landed, "all vehicular traffic through the area was halted," and, once the President had departed the plane, the area was "cleared even of ticket holders waiting to get into the building." Verdict at 3. Although no specific finding was made on the precise time of Bursey's arrest in relation to the time of the shut down, we are obliged — in properly viewing the evidence — to agree with the district court that "at the time of his arrest, the area had, in fact, been shut down." Opinion at 16 (emphasis omitted). On this point, Agent Abel testified that she advised Bursey, prior to his arrest, "[l]ook around you, there is nobody else here . . . . Don't you understand, it's completely closed off now . . . ." *Id.* at 16 n.26. Agent Baker also testified that, at the time of Bursey's arrest, "the ticketholders had actually been moved out of the area" and "when the President is coming in . . . you can't have anybody . . . where they can see him." *Id.* (alterations omitted). In these circumstances, the trial court did not err in determining that the area was restricted pursuant to the Regulations.

## Appendix 13

### B.

Finally, Bursey maintains that the trial court erred in finding that he had "willfully and knowingly" committed the offense charged. *See* Verdict at 4. Although Bursey concedes that he was advised by the officers before his arrest that he was in a restricted area and required to leave, he contends that he was never advised that the area was a federally restricted zone, so designated by the Secret Service. He further asserts that the instructions given to him by the officers were insufficient to supply the necessary knowledge that his conduct was unlawful under the Statute.

Although "[d]ivining the meaning of 'willfully' in criminal statutory *mens rea* terms has long bedeviled American courts," our assessment of whether, under this evidence, Bursey willfully violated the Statute does not present a close question. *United States v. George*, 386 F.3d 383, 389 (2d Cir. 2004) (emphasis in original).<sup>8</sup> Bursey need not have known of the Statute itself (nor, for that matter, the Regulations) in order to possess the requisite intent to violate it. *See Bryan v. United States*, 524 U.S. 184, 196 (1998) (holding, in context of firearms statute, 18 U.S.C. § 922(a)(1)(D), that knowledge of conduct's general unlawfulness, rather than knowledge

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<sup>8</sup>We focus our discussion on whether Bursey "willfully" violated the Statute, because, generally, "[m]ore is required" with respect to conduct performed willfully than conduct performed knowingly. *Bryan v. United States*, 524 U.S. 184, 193 (1998); *see also United States v. Jarvouhey*, 117 F.3d 440, 442 (9th Cir. 1997) (concluding willful violation of 18 U.S.C. § 924(a) requires "more culpable" *mens rea* than knowing violation). As a general proposition, the statutory term "knowingly" requires the Government to prove only that the defendant had knowledge of the facts underlying the offense. *See Bryan*, 524 U.S. at 192-93.

## Appendix 14

of particular criminal statute and regulations, is only requirement for willful violation).<sup>9</sup> As the *Bryan* Court observed, for a defendant to have acted willfully, he must merely have "acted with knowledge that his conduct was unlawful." *Id.* at 193. Thus, Bursey need not have had knowledge of the existence of the Statute — or its federal nature — in order to have willfully violated it.

The Statute required only that Bursey refrain from "willfully and knowingly . . . enter[ing] or remain[ing] in any posted, cordoned off, or otherwise restricted area of . . . grounds where the President or other person protected by the Secret Service is or will be temporarily visiting." 18 U.S.C. § 1752(a)(1)(ii). Bursey plainly intended to enter and remain near Doolittle Hangar, which was a restricted area. He concedes that he knew that the President was visiting the area, that the area was deemed restricted by law enforcement, and that he had been ordered to leave. Furthermore, contrary to Bursey's position on appeal,

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<sup>9</sup>In *Bryan*, the Court acknowledged that it had held to the contrary in a line of decisions addressing currency and taxation statutes — that is, that the term "willfully" in a criminal statute required that the defendant possess knowledge of the particular law that he was charged with violating. 524 U.S. at 194 (citing *Ratzlaf v. United States* 510 U.S. 135 (1994); *Cheek v. United States*, 498 U.S. 192 (1991)). As in *Bryan*, the *Ratzlaf* and *Cheek* line of decisions are inapposite to these circumstances, where the Statute is not technical like the currency and taxation laws and the danger of an innocent state of mind is diminished. *Id.* at 194-95 & n.22 (observing that in *Ratzlaf* and *Cheek*, "'both sets of laws are technical; and both sets of laws sometimes criminalize conduct that would not strike an ordinary citizen as immoral or likely unlawful'" (quoting *United States v. Aversa*, 984 F.2d 493, 503 (1st Cir. 1993) (Breyer, C.J., concurring))).

## Appendix 15

the district court found that he understood the restriction to have been created by the Secret Service (as opposed to state or local law enforcement). Opinion at 17-18. To the extent that Bursey challenges that finding, we again view the evidence (and any reasonable inferences drawn therefrom) in the light most favorable to the Government. *See Pasquantino*, 336 F.3d at 332. In so doing, there was ample evidence that Bursey understood the area to have been restricted by the Secret Service, and thus a federally restricted zone. Specifically, Bursey testified that he believed that "at that event, October, when the President came to town, that the circumstances would be similar to his prior visits, where . . . the Secret Service comes in and preempts" local and state police. Opinion at 17 n.27. Bursey also acknowledged that, in protesting at two earlier visits to South Carolina by the incumbent President, he was advised in both instances that "the Secret Service had basically preempted the security arrangements" of local police. *Id.* Bursey thus took a calculated risk when he defied the orders of the officers to leave the restricted area, thereby intending to act unlawfully. As a result, the trial court's determination that Bursey possessed the requisite intent to commit the offense charged was not clearly erroneous.

### IV.

Pursuant to the foregoing, we affirm Bursey's conviction and sentence.

*AFFIRMED*

Appendix 16

**UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION**

**UNITED STATES OF AMERICA**

**vs.**

**BRETTA. BURSEY**

**JUDGMENT IN A CRIMINAL CASE**

Case Number: 3:03cr0309 (01)

**[ENTERED: SEPTEMBER 14, 2004]**

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**APPEAL FROM MAGISTRATE JUDGE DECISION**

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**Decision by Court.** This action came to hearing before the Court, The Honorable Cameron McGowan Currie, United States District Judge, presiding. In accordance with the written opinion of this Court filed September 14, 2004, the Court affirms the Magistrate Judge's decision as set forth in an Order and Verdict entered January 6, 2004.

**IT IS SO ORDERED AND ADJUDGED** that the conviction of the defendant, Brett A. Bursey, entered on January 6, 2004 is affirmed.

Appendix 17

LARRY W. PROPES, Clerk

By /s/Rebecca A. Willis

Deputy Clerk

September 14, 2004

Columbia, South Carolina



Appendix 18

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION

UNITED STATES OF AMERICA,	)	
	)	Criminal No.
v.	)	3:03-309-22
	)	
BRETT A. BURSEY,	)	Order on Appeal
	)	
Defendant.	)	
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[ENTERED: SEPTEMBER 14, 2004]

This matter is before the court on Brett A. Bursey's appeal of his conviction for violation of 18 U.S.C. § 1752(a)(1)(ii). That conviction followed a bench trial conducted by United States Magistrate Judge Bristow Marchant whose decision is set forth in an Order and Verdict entered January 6, 2004 (hereinafter "Verdict"). For the reasons set forth below, the conviction is affirmed.

INTRODUCTION

Bursey raises two primary arguments on appeal. Bursey first asserts that the trial judge erred by finding that Bursey was, at the time of his arrest, within a "restricted" area within the scope of 18 U.S.C. § 1752. This argument has two subparts. First, Bursey argues that the area was not restricted as required by the statute because there was no form of physical

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demarcation of the boundaries of the restricted area. Second, he argues that the area was not truly "restricted" at the time of his arrest because others were allowed to be in the area.

Bursey also argues that the trial judge erred by finding that Bursey possessed the requisite specific intent to violate the statute. This argument focuses on Bursey's understanding that he could not be prosecuted for state law trespass, the particular crime for which he was initially arrested.

Bursey has also alluded to several constitutional concerns. These concerns are before the court only to the extent they relate to the proper construction to be given the statute under which Bursey was convicted. Bursey does not, however, challenge the Magistrate Judge's finding that there was no evidence of selective prosecution.<sup>1</sup> Neither does Bursey challenge the Magistrate Judge's finding that it was reasonable to restrict the area in which Bursey was located at the time of his arrest, making concerns as to the outer

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<sup>1</sup> The Magistrate Judge found that the evidence did not "support Defendant's claim that the only reason he was charged . . . was because he was protesting against the President." In reaching this conclusion, the Magistrate Judge observed that there "was no evidence . . . that any other persons, either supporting the President or opposing him, were allowed to remain in the area around the hanger for the purpose of demonstrating, pro or con, upon the President's arrival." Verdict at 6. See also Verdict at 11 (finding "no evidence . . . that *any other person*, either supporting the President or opposing his policies, entered and remained in the restricted area with no ticket and no intention of attending the rally, and then refused to leave the restricted area when so instructed" -emphasis in original).

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boundaries of the area irrelevant.<sup>2</sup> In addition, while some of Bursey's arguments suggest concerns with the placement of what has been described alternately as a "free speech" or a "demonstration" zone, the constitutionality of that zone is not at issue in this appeal. See generally *Bl(a)ck Tea Society v. City of Boston*, 2004 WL 1700115 (1<sup>st</sup> Cir. 2004) (affirming denial of injunction against substantial but content-neutral limitations on demonstrations at the Democratic National Convention).

### STANDARD OF REVIEW

The legal conclusions of the trial judge, including his interpretation of the statute and related regulation are reviewed *de novo*. E.g., *United States v. Williams*, 364 F.3d 556, 558 (4<sup>th</sup> Cir. 2004). Other aspects of the conviction are, by contrast, reviewed under a sufficiency of the evidence standard. *United States v. Pasquantino*, 336 F.3d 321, 332 (4<sup>th</sup> Cir. 2003) (en banc). Under this standard, the appellate court determines "whether there is substantial evidence in the record, when viewed in the light most favorable to the

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<sup>2</sup> The Magistrate Judge found that, at the time Bursey was first advised that he was in a restricted area and would have to leave, Bursey was "literally within a few yards from where the President's automobile would be parked." Verdict at 4. The Magistrate Judge also found that while Bursey moved from his initial stopping place after being told he would have to leave the area, he only moved diagonally across the intersection. *Id.* Thus, Bursey "remained in close proximity to the hanger, as well as being on the corner of the intersection where the President's automobile would have to exit the parking lot and make a slow u-turn." *Id.* The Magistrate Judge also found that Bursey was "again advised that he could not remain in that location and would have to leave the area, and that he refused to do so." *Id.*

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government, to support the conviction." *Id.* "In determining whether the evidence in the record is substantial," the appellate court examines "whether there is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *Id.* (also noting that "reversal on grounds of insufficient evidence is confined to cases where the prosecution's failure is clear").

### STATEMENT OF FACTS<sup>3</sup>

On October 24, 2003, the President of the United States visited Columbia, South Carolina for a political rally being held in a hanger at the Columbia airport. Verdict at 1-2. *See also* Record at 1-27.<sup>4</sup> Prior to the President's arrival, the Secret Service defined a "restricted area" around the hanger where the rally would be held. Record 1-13 (testimony of Secret Service Special Agent Cohen). *See also* Record at 1-51 (Cohen indicating that although there was no written diagram of the area restricted, he and other law

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<sup>3</sup> This statement of facts is taken predominantly from Bursey's opening brief which states that the facts are as "found by the trial court, testimony of government witnesses, or uncontroverted testimony of defense witnesses in the record." Appellant's opening brief n. 1. Additional citations to supporting portions of the record beyond those cited by Bursey are indicated by "see also" cites. Other evidence before the trial court which differs from or extends beyond the facts as recited by Bursey is addressed in footnotes to this section or in later sections of this opinion.

<sup>4</sup> References to the trial transcript are set forth by volume and page number, e.g. "Record 1-27."

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enforcement officers involved in planning security walked "every inch of it" during the week before the President's arrival and "it was pretty defined"-also stating that "on the day of the [President's] visit, my police counterpart takes his police assets and posts them based on what we talked about and gives them their verbal instructions").

The restricted area extended approximately 100 yards on either side of the hanger and approximately one-half mile away from the hanger. Record 1-84 (colloquy with court) & 1-100 (testimony of Airport Chief of Police Blackmon). See also Record at 1-18 (Cohen).<sup>5</sup> The boundaries of the area were not, however, marked by any physical barriers or signs. Verdict at 6-7.

According to Cohen, the Secret Service agent in charge of securing the site, the restrictions were in effect from 7:30 in the morning until the President's departure. Record 1-27 (Cohen). Vehicles were, however, permitted to traverse the roads though the restricted area until shortly before the President's anticipated noon arrival. Verdict at 3 & 7; Record at 1-22 (Cohen). Pedestrians were, likewise, allowed to pass through the area until shortly before the President's arrival. *Id.* Record at 1-49 (Cohen stating

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<sup>5</sup> Secret Service Agent Cohen described the restricted area as follows: "The restricted area went from along Airport Boulevard up to the next intersection . . . about 100 yards up Lexington Avenue . . . , basically to the mouth of the [college] parking lot entrance . . . [continuing] down Airport Boulevard all the way to 302, which was the motorcade route, primary and emergency." Record at 1-18.

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"the restrictions don't mean people can't pass through [the] restricted area"). Nonetheless, vehicles were not allowed to stop or remain in the area.

Pedestrians were allowed to remain in the area only if they were or appeared to be ticket holders.<sup>6</sup> Verdict at 3 & 7. These individuals were all directed to a line awaiting entry to the hanger. Numerous individuals were present in this line as roughly 7000 tickets had been freely distributed by the rally's sponsor, the Republican Party of South Carolina. Record at 2-44 & 2-49 to 2-50.

Once the President's plane landed and before he arrived at the hanger, the restricted area was "shut down," meaning that it was cleared except for law enforcement and related security personnel, all of whom wore lapel pins issued by the Secret Service. Verdict at 3; Record at 1-23 & 1-31 (Cohen). This clearing extended to passing vehicle traffic, traversing pedestrians and presumed ticket holders waiting in

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<sup>6</sup> At one point, Cohen testified that tickets were checked when individuals came into the area as well as when they reached the metal detectors. Record at 1-63 to 64 (indicating uncertainty as to the precise location where they were first checked, although it was "in the vicinity of Airport Boulevard and Lexington"). This checking was not, however, done by law enforcement. Record at 1-66. Other testimony, including from Cohen, suggests that any ticket checking was random or consisted only of asking individuals if they had tickets. The Magistrate Judge made no specific finding as to this point. For purposes of this order, therefore, the court assumes that persons in line were merely *presumed* ticket holders and, therefore, not necessarily "invitees" within the meaning of the relevant regulations. See *infra* Discussion.



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line.<sup>7</sup> Record at 1-22 & 1-29 to 1-31 (Cohen). The area was again cleared at the time of the President's departure. Verdict at 3. *See also* Record at 1-22 to 1-23 (Cohen).<sup>8</sup> *See also* Verdict at 2 (noting that, following the rally, "the President left the airport by motorcade to attend to other matters in the Columbia area").

Secret Service Agent Cohen testified that the Secret Service considered the presumed ticket holders who were waiting in line to be part of the general public. Record at 1-64 (Cohen). After waiting in-line, the ticket holders presented their tickets to the hosting group or Presidential staff and then were screened through a metal detector by the Secret Service before entering the hanger area. *Id.* & Record at 1-87 (Cohen).

Prior to the time the area was cleared for the President's arrival, Brett Bursey arrived by car. Record

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<sup>7</sup> Rather than actually being removed from the area, the individuals who were still waiting in line were moved around the opposite side of the building to where they would not have line of sight of the President's arrival.

<sup>8</sup> Secret Service Agent Cohen testified that, up until shortly before the President's arrival, security allowed vehicles to "pass through" but not to stay in the area. However, "right when the President is about to arrive, we shut down all access, even to Airport Boulevard, in this case, to all traffic and all foot traffic." This applied also to individuals with tickets because they were "in our secure or restricted area, but they [were] not screened until they c[a]me to the building." Record at 1-22. The area would be shut down for two reasons. First, "it was [the] emergency egress upon arrival, and [the] primary egress . . . for the motorcade route when we departed. And also it was in close proximity to the arrival area, close enough that someone standing there that was unscreened could cause harm." Record at 1-23.

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2-207. Bursey came to the event for the purpose of protesting certain of the President's policies. Verdict at 2. He had previously announced these intentions to Major Weaver of the South Carolina Law Enforcement Division when he called to inquire regarding any planned "demonstration area."<sup>9</sup> Bursey also carried signs which, likewise, signaled his intent. Record at 2-200 & 2-207 to 2-209 (Bursey). Upon arrival, Bursey walked over to a grassy area near the hanger, carrying a number of signs as well as a megaphone. Record 1-120 (Secret Service Agent Abel); 2-207 to 209 (Bursey).

After stopping on one side of a road intersection near the hanger, Bursey was approached by law enforcement officers who advised Bursey that he could not remain where he was because he was in a restricted area.<sup>10</sup> After being provided this information, Bursey

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<sup>9</sup> There is some dispute in the record as to what occurred in the conversation. Bursey testified that he called Weaver and was told that someone would get back with him but that no one ever did. Bursey conceded that he did not follow up to determine where the "demonstration area" was located. Record at 2-234-35 (indicating that Bursey did not follow up because he expected someone from SLED to get back with him). Lieutenant Baker testified that she understood that Bursey was told to call her but that he did not. Record at 1-235 (this testimony was brought out on cross examination and no challenge was made to its foundation). For purposes of this appeal, the dispute is of no significance beyond showing that law enforcement was aware that Bursey planned to demonstrate and that Bursey was aware that access to areas around the hanger would be restricted.

<sup>10</sup> The recitation of facts in Appellant Bursey's brief is quite limited on the communications which occurred at this point. Testimony regarding the encounter was, however, extensive and revealed a sharp dispute between Appellant and the government witnesses as to what Bursey was told and as to what comments he

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crossed the street diagonally to the far corner of the same intersection. Verdict at 4. Law enforcement officers advised Bursey that this side of the intersection was also restricted. *Id.* One of the two officers, Secret Service Special Agent Abel, advised Bursey that he had several choices: (1) go home; (2) get in line if he had a ticket; (3) go to the designated demonstration area; or (4) suffer the consequences and be arrested. Abel 1-159. *See also* Record at 1-188 to 1-189 (Abel testifying that she advised Bursey: "If he wanted to demonstrate, he needed to go to the demonstration area. If he wanted to go in the event, he needed to get in line. But he couldn't just hang out in that area."). *See also* Record at 2-212 to 2-213 (Bursey testimony that Abel was "strident about her insistence that I couldn't be there, I had to go to the free speech zone" but also stating that no police officer in the group advised him where that zone was located).<sup>11</sup>

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made to law enforcement. *See infra* at Discussion, Specific Intent (discussing testimony of Abel and Baker).

<sup>11</sup> When asked if he was saying that there was "no one out there that day [who] could direct you to where... the designated area was," Bursey gave the following qualified response:

I think the record reflects that there were multiple places, multiple sets of directions and confusion. And the answer to your question is, yes, I don't believe there was anyone out there that could have competently directed me to an area in which I could have expressed my free speech adequately."

Record at 2-243 (emphasis added). He also testified that "no police officer gave me that instruction." Record at 2-244 (the query was, however, limited in this manner-emphasis added). Other defense witnesses present during the latter part of Bursey's encounter with law enforcement also denied being advised where the

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Several other individuals joined Bursey after he crossed the intersection. These individuals were also told that they could not remain in the area and would have to go to the demonstration area.<sup>12</sup> Record at 2-61 (Sergeant James Campbell, Airport Police). *See also* Record at 2-212 to 13 (Bursey to same effect).

At some point after Bursey crossed the intersection to his second location, he pointed out to Agent Abel that there were individuals waiting in line who were closer to the hanger than he was. Bursey asked why he could not remain where he was without

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demonstration area was located. *E.g.*, Record at 2-154 (Sanders); Record at 2-141 (Rogers). By contrast, both Abel and Baker testified that they directed Bursey to the demonstration area. Record at 1-123 & 1-198 (Abel) & 1-204 (Baker).

<sup>12</sup> The demonstration area was established by local law enforcement personnel at Airport Boulevard and 302. Record at 1-25 to 26. According to Cohen's description of the restricted area, this would either be within or at the very edge of the restricted area and along the President's motorcade route. While established by local authorities, the demonstration area was subject to Secret Service approval. Record at 1-25 (Cohen stating "we discussed it with the police and they had told us that this would be the designated demonstration area and asked us if it was a problem for us being there, and we said no"). Bursey, however, testified that none of the law enforcement officers at the site told him where the demonstration site was located and further indicated that he was not aware of the location. Record at 2-213. Nonetheless, he indicated that he gave signs to a fellow demonstrator when she left so that she "could take them to the free speech zone." *Id.* Thus, he does not suggest that he could not have determined the location which was, in fact, only a short distance away. Moreover, the officers on the scene testified that Bursey indicated that they told him where the demonstration area was located but Bursey told them "he did not want to go there." Record at 1-123 (Abel) & 1-204 (Baker).

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risking arrest when there were others standing even closer to the hanger. Record 1-173 to 74 (Abel). Abel responded that those individuals had tickets to the rally. *Id.*<sup>13</sup> Bursey continued his refusal to leave.

Secret Service Agent Abel then contacted the Airport Police and asked that they remove Bursey from the area. Record at 1-183. Airport Police Sergeant Campbell responded and advised Bursey "to leave the area, he was trespassing." Record at 2-62 (Campbell). Bursey, being aware of a prior South Carolina Supreme Court decision dismissing a trespassing charge against a demonstrator on airport property based on the public nature of the property and specific language of the trespass statute, believed that he could not be charged with trespassing.<sup>14</sup> Record at 2-216 to 17 (Bursey).

Bursey continued his refusal to leave and was arrested for "trespass after notice" by Sergeant Campbell of the Airport Police. Record at 2-62. The trespass charges were dismissed when the Airport Police realized that the charge was defective because the property was public property not subject to South

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<sup>13</sup> While not discussed in Bursey's recitation of the facts, there is substantial evidence that the area was cleared even of the presumed ticket holders prior to the time of Bursey's arrest. See, e.g., Record at 1-174 (Abel noting that even the individuals with tickets were required to move once the area was "shut down"); Record at 1-29 to 1-30 (Cohen discussing measures taken to keep even ticket holders out of the area where they would have a line of sight to the President's arrival when it appeared the President might arrive before all of the ticket holders could be cleared through the metal detector and moved into the hanger).

<sup>14</sup> The case to which Bursey refers is apparently *State v. Hanapole*, 178 S.E.2d 247 (S.C. 1970).



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Carolina's trespass statute. Record 2-66 (Campbell).<sup>15</sup> Federal charges were brought, over four months after the incident, pursuant to the federal statute under which Bursey was ultimately convicted, 18 U.S.C. §1752(a)(1)(ii). *See* Information.

Bursey testified that he was not aware of the existence of the law under which he was ultimately convicted: for entering or remaining in a federally restricted area. Record at 2-220 (Bursey). He also testified that he was not aware that the area was federally restricted. *Id.*<sup>16</sup>

### DISCUSSION

Bursey was convicted of violation 18 U.S.C. § 1752(a)(1)(ii) which reads as follows:

**§ 1752. Temporary residences and offices of the President and others**

(a) It shall be unlawful for any person or group of persons-

(1) willfully and knowingly to enter or remain in

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<sup>15</sup> The decisions to effect Bursey's removal through his arrest and to charge him with trespass were made by the Airport Police, not the Secret Service. Record at 1-131 to 1-132 (Abel) & 2-63 (Campbell).

<sup>16</sup> Bursey's claim of ignorance contrasts with his own testimony regarding his extensive prior dealings with the Secret Service and local law enforcement at similar events. *See infra* Discussion, Specific Intent (discussing additional testimony).



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(ii) any posted, cordoned off, or otherwise restricted area of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting,

in violation of the regulations governing ingress or egress thereto[.]

18 U.S.C. § 1752(a)(1)(ii).

The regulations governing ingress or egress limit access to various categories of individuals, none of which could apply to Bursey. The only possible category to which he could have belonged was that of "invitee" which did not apply because he did not have a ticket. The relevant regulation reads as follows:

### § 408.3 Rules governing access.

(a) For the purposes of 18 U.S.C. § 1752 (84 Stat. 1891, 96 Stat. 1451), ingress or egress to or from . . . any posted, cordoned off, or otherwise restricted areas of a building or grounds where the President or other person protected by the United States Secret Service is or will be visiting is authorized only for the following persons:

(1) Invitees: Persons invited by or having appointments with the protectee, the

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protectee's family, or members of the protectee's staff;

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(b) Authorized persons must possess and display identification documents issued by or satisfactory to the United States Secret Service.

(c) Unauthorized entry is prohibited.

(d) The term "protectee" as used in this rule includes the President and any other person receiving protection from the United States Secret Service as provided by law.

31 C.F.R. § 408.3.

### **Posting or cordoning off of restricted area.**

Bursey asserts that the trial court erred in finding that he was in a restricted area at the time of his arrest because the boundaries of the area were not physically marked. This argument presumes that such physical manifestation of the boundaries is required to establish that an area was "posted, cordoned off, or otherwise restricted" as that phrase is used in the statute.

In arguing for such an interpretation, Bursey rests on two canons of construction. First, he relies on the rule that penal statutes must be strictly construed. See *United States v. Eppinette*, 488 F.2d 365, 367 (4<sup>th</sup> Cir. 1973). Second, he relies on the canon of *ejusdem generis*,

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which is that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Washington State Dept. of Social and Health Services v. Guardianship Estate of Danny Keffeler*, 537 U.S. 371, 384 (2003) (citations and internal quotations omitted). Thus, he argues that the "general term 'otherwise restricted' must be construed to embrace only physical indicia similar in nature to 'posted' or 'cordoned off.'" Appellant's opening brief at 8.

This allegation of error fails, even applying these cannons of construction as Bursey argues they should be applied, because the meaning of the terms "posted" and "cordoned" are not nearly so narrow as Bursey suggests. Post, for instance, has numerous definitions encompassing both the posting of physical boundaries or notices and the posting of a sentry or guard including: "to publish, announce, or advertise by or *as if by* use of a placard"; "to forbid (property) to trespassers under penalty of legal prosecution by notices placed along the boundaries"; "the place at which a soldier is stationed"; "*a sentry's beat or station*"; and "*to station in a given place* <guards were [post]ed at the doors>." Merriam Webster's Collegiate Dictionary at 909 (10<sup>th</sup> Ed. 1997) (emphasis added). Cordon, likewise, encompasses both the use of physical barriers and the use of personnel including the following definitions: "a line of troops or of military posts enclosing an area to prevent passage"; "a line of persons or objects around a person or place <a [cordon] of police>"; and "to form a protective or restrictive

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cordon around— usu[ally] used with off.” *Id.* at 257 (emphasis in original).

Thus, Bursey’s argument ignores the more basic canon of construction that words in statutes are generally to be given their “ordinary, contemporary, and common meaning.” *Scott v. United States*, 328 F.2d 132, 138-39 (4<sup>th</sup> Cir. 2003). As explained in *Scott*:

When interpreting a statute, the goal is always to ascertain and implement the intent of Congress. The first step in this process is to determine whether the statutory language has a plain and unambiguous meaning. If the statute is unambiguous and if the statutory scheme is coherent and consistent, our inquiry ends there.

When examining statutory language, [the courts] generally give words their ordinary, contemporary, and common meaning. The Supreme Court has explained that “[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.”

*Scott*, 328 F.3d at 138-39 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

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Bursey's argument also fails to recognize that the word "otherwise" suggests, at the least, a different means of accomplishing the same result. "Otherwise" is defined as: "something or anything else: something to the contrary"; "in a different way or manner"; and, simply, as "different." *Id.* at 823-24.<sup>17</sup>

The purpose of the requirements for cordoning or posting in the statute now at issue is clearly to give notice that one is entering or within a restricted area. See S. Rep. No. 91-1252, 91<sup>st</sup> Cong., 2d Sess., 9 (1970) ("It is anticipated that the Secret Service will make every effort, consistent with Presidential security, to make such restricted areas known to the public (i.e. by posting or cordoning off)." - emphasis added). See also *id.* at 8 (stating concern that public needs a "rational way of predicting whether one's activities were actually violating the law or not").<sup>18</sup> In light of this purpose and the context of the statute, the court concludes that

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<sup>17</sup> The case of *United States v. Headspeth*, 852 F.2d 753 (4<sup>th</sup> Cir. 1988), on which Appellant relies, requires no contrary result. Indeed, the case has been overruled in part, although arguably not as to the precise point for which Appellant cites it in this appeal: the narrow construction of the term "otherwise" in defining crimes which might support sentencing-enhancement. See *Taylor v. U.S.* 495 U.S. 575, 579-584 (1990) (resolving split in the circuits regarding proper construction of sentencing statute's reference to meaning of "burglary").

<sup>18</sup> In this case, for instance, had Bursey been arrested upon entry to the area and prior to personal warning, he might well be able to argue that his arrest (and conviction) was improper. The relevant argument, however, would go to the combined effect of the need for some form of demarcation (physical or through personnel) and the requirement that any violation of the restricted area be "willful."

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the phrase "otherwise restricted" suggests use of a different means to achieve the same purpose of giving notice that one is entering or within a restricted area. See generally *Norfolk and Western Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 129 (1991) (principle of *ejusdem generis* "does not control . . . when the whole context dictates a different conclusion"); *Scott*, 328 F.3d at 139 (noting requirement to consider "the specific context in which that language is used, and the broader context of the statute as a whole" — quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

This court concludes that the purpose of the statute and context in which the terms are used support rather than undermine giving the terms, "posted" and "cordoned off," their normal broad meanings. Likewise, these considerations support construing the term "otherwise restricted" to include other means of giving notice that an individual is entering or within a restricted area.

While Bursey may not have had notice of the precise limits of the restricted area, the evidence is overwhelming that the location where he insisted on remaining was, in fact, designated as a restricted area and was "posted" or "cordoned off" within the meaning of the statute.<sup>19</sup> It is undisputed that Bursey

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<sup>19</sup> Although the large restricted area was not marked by physical barriers, security officers were posted on the perimeter and as rovers within the restricted area. Record at 1-27 (Cohen stating that beginning roughly five hours before the President's arrival "we posted the perimeter with the police and the secure area with our agents as well"); Record at 1-43 to 44 (Cohen indicating that they sometimes use bike racks and sometimes



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was personally advised that he was within a restricted area, although he claims some lack of understanding of the purpose of the restrictions or by whom they were imposed. There is also undisputed evidence that Bursey was repeatedly instructed to leave by multiple law enforcement officers and repeatedly refused. Testimony from prosecution witnesses puts these repeated requests as covering a period of over twenty minutes and indicates that Bursey was told that one of the persons giving the instructions was a Secret Service Agent. Thus, the conclusion that Bursey willfully remained within a restricted area is well supported by the evidence.

The evidence also clearly supports the conclusion that, regardless of whether the outer limits of the restricted area were reasonable, it was wholly reasonable to restrict the area where the events at issue occurred. There is, moreover, only minimal evidence that Bursey made any effort to move in the direction of the outer boundaries (that being his minimal movement across the intersection from his initial stopping point), and no evidence (at least none that the trial court was required to accept), that Bursey made any genuine effort to remove himself from the

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"have people standing there to demark your area" and, in this case, used bike racks only in one area on the tarmac side of the hanger). Secret Service Agent Cohen testified that an individual would be able to determine where the restricted area was because they "put the police and the agents out." Record at 1 -19 to 20 (also indicating that an officer or agent would have been posted at the end of each of the areas described).

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restricted area.<sup>20</sup> Under these circumstances, Bursey cannot argue that the restricted area was not properly designated as required by the statute under which he was convicted or was somehow excessive in scope.<sup>21</sup> It is, in this regard, significant that Bursey was convicted not of improperly entering the restricted area, but of remaining within it. Verdict at 4 (finding "beyond a reasonable doubt that [Bursey] knowingly *remained* in this restricted area"-emphasis added).<sup>22</sup>

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<sup>20</sup> See generally Verdict at 7-8 ("the issue . . . is not whether the outer boundaries of this restricted area were unreasonable. The Defendant was not at the outer boundaries, or even close to those boundaries") & Verdict at 9 ("This is not to say that the Secret Service's power to restrict the area around the President is absolute. Nor are protestors required to go to designated demonstration areas, as long as they do not otherwise remain in a properly restricted area. . . . Hence, if the Defendant had chosen to keep moving further and further away from the hanger, and if he had still been arrested, not at the location where he was, but at a much further distance from the hanger, he would have had a stronger case that the Government's actions were unreasonable and therefore unconstitutional. Again, however, that is not what happened in this case. The Defendant effectively sealed his own fate when he chose to make his principled stand in a location manifestly reasonable for the Secret Service to secure.")

<sup>21</sup> In light of these conclusions, the court does not reach the question of whether the Secret Service may refuse to provide notice of the outer boundaries of an area on request. This question raises competing concerns relating to security (given testimony that providing notice of the boundaries may raise security concerns) and the rights of individuals to traverse or remain in any area which is not restricted.

<sup>22</sup> On reply, Bursey argues that the oral notice he was given that he was in a restricted area was inadequate because he was not "told that the area had been designated a restricted area by the United States Secret Service." Reply at 2. This argument

### Level of Restriction.

Bursey's second argument is that, even the area was "restricted" in some sense, it was not adequately restricted at the time he was told to leave because others were allowed to traverse the area. Ticket holders (or persons presumed to be ticket holders) were, as Bursey suggests, allowed to remain in the restricted area, at least up until shortly before the President's arrival. Likewise, vehicles were allowed to traverse the area during this time.

The evidence, however, is virtually undisputed that the presumed ticket holders were directed to a particular area (along a fence) to wait in line. Record at 1-18 to 1-20 (Cohen).<sup>23</sup> Indeed, it was Bursey's failure to move to the ticket holder line that first drew attention to him.<sup>24</sup> Thus, while not "shut down" at the

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assumes a requirement of notice that is not suggested by the statutory language. In any case, Bursey was neither unaware of the reason for the restriction (protection of the President) nor of the active involvement of the Secret Service in enforcing the restrictions. See *infra* Discussion, Specific Intent (discussing Bursey's significant prior actions relating to such restricted areas).

<sup>23</sup> The security forces on site assumed that individuals arriving in the area were coming to the event unless there was something unusual to alert them to the contrary such as the individuals not getting in line or indicating they did not have a ticket. Record at 1-21.

<sup>24</sup> Agent Abel first noticed Bursey standing near the intersection of Lexington and Airport Boulevard, within the restricted area. Record at 1-120. Bursey had "a bunch of signs underneath his arm" as well as "a megaphone in the other hand" and was "standing by himself." Record at 1-120 to 1-121. Other individuals within the area were either in line or walking down

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time Bursey was first approached, the area was clearly subject to restrictions, that is, to limitations and controls. As the Magistrate Judge noted, the evidence shows that Bursey was the only person who insisted on ignoring these restrictions after being advised of them. See Verdict at 11 (unchallenged finding that there was "no evidence to show that *any other person*, either supporting the President or opposing his policies, entered and remained in the restricted area with no ticket and no intention of attending the rally, and then refused to leave the restricted area when so instructed").

There is nothing in the statute to suggest that the Secret Service can only control an area through an absolute prohibition on entry. Such an argument equates "restricted" with "shut down" which is not only contrary to the flexibility suggested by the statute but defies common sense as it would require the Secret Service to impose draconian measures (such as closing off all traffic along this route to the airport for an extended period of time) in order to provide any protection within a given area. See Verdict at 7 ("Both foot and vehicular traffic by necessity had to travel through this area for people to come to the event, and it was also necessary to keep the area open for travel to and from the airport itself."). In any case, the need for an interim period in which access to an area is

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Lexington Avenue. Record at 1-121. Bursey appeared "out of place" because other "people were not congregating in that area, they were only there to cross that intersection and get in line." Record at 1-122.

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controlled and limited is imminently logical.<sup>25</sup> Bursey's reliance on this argument also ignores the evidence that, *at the time of his arrest*, the area had, in fact, been shut down.<sup>26</sup>

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<sup>25</sup> Bursey has not challenged the trial court's conclusion, which with this court, in any case, agrees, that the possibility that Bursey could have been screened where he stood does not require the Secret Service to accommodate his preferences. As the trial court noted:

The Defendant is not an island, with rights unto himself not shared by others. If the Defendant had a constitutional right to stand in that location, and the Secret Service did not have the power and authority to require him to move, then the Service similarly would not have had the power and authority to move other citizens who also wanted to stay in that location.

Verdict at 9, n.2. This rationale, of course, applies to the whole of the restricted area. That is, if the Secret Service could not restrict non-invitees (and invitees for that matter) from remaining in this part of the restricted area, they could not restrict them from any other part of the restricted area.

<sup>26</sup> At the point Able sought out a local law enforcement officer to remove Bursey due to his repeated refusals, the area was "restricted to everybody except law enforcement." Record at 1-126. See also Record at 1-131 (Able testimony that she advised Sergeant Campbell that Bursey "was in a restricted area and now it had been completely shut down") & Record at 1-205 to 1-206 (Baker testimony that, at the time of the arrest, "the [ticket holders] had actually been moved out of the area" and that they had been moved so "they did not have a line of sight"); Record at 1-207 (Baker testimony that President arrived within two to ten minutes after Bursey's arrest); Record at 1-255 (Baker) explaining that line was cut and moved out of the line of sight because "[w]hen the President is coming in . . . you can't have anybody . . . where they can see him. It's a security issue, it's for his



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### Specific intent.

Bursey's final argument is that he lacked the required specific intent to violate the statute because he did not know that his conduct was unlawful. In this regard, he argues that the oral warnings and directions he was given were vague and "insufficient to supply the knowledge that his conduct was unlawful." Appellant's opening brief at 16. This argument ignores significant trial testimony some of which is set forth in Bursey's statement of facts. Additional factual support for the conclusion that Bursey "*willfully and knowingly . . . remain[ed] in [a] posted, cordoned off, or otherwise restricted area . . . where the President [would] be temporarily visiting*" is set forth below.

First, it is beyond dispute that Bursey was aware the President was visiting the area. This was, in fact, his reason for being present as he intended to protest the President's policies. *See, e.g.,* Record at 1-123 (Abel testimony that when first approached Bursey stated that he was there to "demonstrate" or to "exercise his freedom of speech" or words to that effect). It is also beyond dispute that Bursey was repeatedly, advised

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protection.") Once the area was restricted to this level and prior to his arrest, Abel testified that she told Bursey:

Look around you, there is nobody else here. . . . Don't you understand, it's completely closed off now. . . . I don't care if you are a little girl with a bunch of flowers to give the President, I would make you leave, because at this point this entire area is closed except for Secret Service and law enforcement.

Record at 1-128.



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that "he was in a secure or restricted area and that he would need to leave." Record at 1-198 (Baker). *See also* Record at 1-124 (Abel-stating that she "explained to him that this was a restricted area, and that he could not stay there").

While Bursey denied being advised that Abel was a Secret Service Agent, she testified that she did so inform him. Record at 1-123. To the extent such knowledge may be required, Bursey's own testimony confirms that he understood the restrictions would be established by the Secret Service.<sup>27</sup>

Abel also testified that she advised Bursey of the designated demonstration area and advised him where it was located. *Id.* According to Abel, Bursey responded that he was aware of the demonstration area's location, that it was too far away to be effective,

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<sup>27</sup> Bursey testified that he was aware that the Secret Service was responsible for establishing restricted areas for such events. Indeed, he stated a personal view that the Secret Service influenced or required the placement of demonstration areas at inconvenient or ineffective locations and generally preempted local law enforcement in regard to the restricted areas. Record at 2-202 (Bursey explaining, as to two prior events, that "local police told me that the Secret Service had basically preempted the security arrangements and that they had established free speech zones for us to go to."); Record at 2-235 (Bursey explaining his failure to follow up with SLED by stating: "I had more reason than not to believe that at that event, October, when the President came to town, that the circumstances would be similar to his prior visits, where it doesn't matter what you discuss with the local police or the state police, the Secret Service comes in and preempts it. . . . I didn't see any need or that it would be productive to discuss the issue with local police once the Secret Service had preempted control of the event.").

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and that he did not want to go there. Record at 1-124. See also Record at 1-126 (Abel indicating that when others arrived to join Bursey she "explained the same thing to them about the demonstration area"); Record at 1-203 (Baker-same). Also according to Abel, Bursey never indicated a desire to go to the demonstration area through their long encounter, even when the others who joined him left, but instead indicated a preference for being arrested.<sup>28</sup>

Bursey's own testimony also supports the conclusion that he did not misunderstand the nature of the restrictions but took a calculated risk in challenging them, as he had successfully done in prior situations.<sup>29</sup>

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<sup>28</sup> At the point the other individuals arrived, Abel had been conversing with Bursey for ten to fifteen minutes. Record at 1-127 (Abel); Record at 1-199 (Baker testimony re extended exchange). After being advised that they would have to leave or be arrested, the other individuals made some calls on cell phones, not giving their answer right away, while Bursey gave the immediate response: "Arrest me." Record at 1-129 (Abel). After about five minutes, the other individuals departed but Bursey remained. Record at 1-130 (Abel); Record at 1-203 (Baker). A member of local law enforcement (other than Baker) was also present by this time telling Bursey the same things. Record at 1-130 to 31 (Abel).

<sup>29</sup> Bursey testified that he had achieved at least some prior successes in having the demonstration areas moved either by protesting the location after arriving at the site or by simply refusing to move. Record at 2-226 (discussing event in Charleston in which he was threatened with arrest for refusing to leave a restricted area "[a]nd the arguments went back and forth to a point that we had . . . probably 40 or 50 people there. And the police decided that they would move the free speech zone."); Record 2-227 (indicating that as a result of these prior encounters "I thought that calmer rational minds would prevail and that I

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Indeed, Bursey's counsel argued at trial that his defense was that he believed the government was merely bluffing and that he had a right to rely on that belief due to these prior encounters:

The Court: [A]re you telling me his defense is that he didn't think that he was knowingly in a restricted area and would be arrested if he didn't leave because he had been told that before and hadn't been arrested, so he had a right not to believe them when they told him that this time?

Mr. Pitts: That's exactly right, Judge. Because that's the bluff that they do. That's their bluff that's been occurring . . .

Record at 2-184.

Ultimately, Agent Abel requested that an airport police officer be summoned to remove Bursey when he

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could work something out with the local authorities to allow us to be somewhere we felt was an effective venue for our expressing our freedom of speech"); Record 2-212 (Bursey indicating that during the encounter with Baker and Abel "I was reflecting on the fact that we had just been through similar scenarios in two different cities where they told us the same thing, and that we basically found a place that we felt was out of the way to accommodate their concerns and ours, and they left us there."). As to the date in question he testified: "I had every reason to believe I would not be arrested based on the past conduct of the Secret Service and local police during President Bush's visits." Record at 2-215.

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would not leave voluntarily.<sup>30</sup> The airport police officer arrived and was advised by Abel that the area was now completely shut down and that Bursey refused to leave. Record at 1 -131. The airport police officer, Campbell, advised Bursey that he was going to be arrested and did, in fact, arrest him on a charge of "trespass after notice." Record at 1-132 (Abel).<sup>31</sup>

The trial court found that Bursey

both willfully and knowingly remained in th[e] restricted area after he had been instructed to leave. The testimony and evidence shows that the Defendant was initially in a grassy area near the sidewalk located right next to the hanger

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<sup>30</sup> Abel explained the decision to have the local officer make the arrest as follows:

That's just something that we usually do. It facilitates the whole process if a local law enforcement handles it as opposed to us. It's their jurisdiction. That way if the locals are handling the arrest, then we won't be coming to South Carolina to testify and fill out paperwork.

Record at 1-132.

<sup>31</sup> Bursey also testified to a remark by Sergeant Campbell that, if accepted as true by the trial court, would have raised serious concerns about the reason for the arrest. That is, Bursey testified that Sergeant Campbell indicated the reason for the arrest was the content of his sign. Record at 2-250. There is, however, no evidence that any of the other law enforcement officers present either made statements or took action which suggested such a motivation.

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and right next to the area where the President's motorcade would pull up . . . . When the Defendant was advised that he could not remain in that location, he proceeded to cross Airport Boulevard diagonally to the far corner of the intersection across from the hanger. . . . The evidence . . . establishes that the Defendant was again advised that he could not remain in that location and would have to leave the area, and that he refused to do so.

Verdict at 4. In light of the above evidence, this court concludes that there was more than sufficient evidence to support these conclusions and to establish that Bursey had the requisite specific intent to violate 18 U.S.C. § 1752(a)(1)(ii).

### CONCLUSION

For the reasons set forth above, this court finds no error and affirms Appellant's conviction for violation of 18 U.S.C. § 1752(a)(1)(ii).

IT IS SO ORDERED.

/s/ Cameron McGowan Carrie  
CAMERON MCGOWAN CARRIE  
UNITED STATES DISTRICT JUDGE

Columbia, South Carolina  
September 13, 2004

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
	)	Criminal No.
v.	)	3:03-309
	)	
	)	
BRETT A. BURSEY,	)	ORDER
	)	AND
Defendant.	)	VERDICT
	)	

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[ENTERED: JANUARY 6, 2004]

The Defendant has been charged with a violation of Title 18 U.S.C. § 1752(a)(1)(ii), which makes it unlawful for any person or group of persons to willfully and knowingly enter or remain in any posted, cordoned off, or otherwise restricted area of a building or grounds where the President or other person protected by the Secret Service is or will be temporary visiting, in violation of the regulations governing ingress or egress thereto. This matter came for trial before the Court, non-jury, on November 12-13, 2003, following which a final decision in the case was taken under advisement pending filing of post-trial briefs.

This case arises out of a visit to Columbia, South Carolina by the President of the United States on October 24, 2002. On that date, the President's plane



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landed at Columbia Metropolitan Airport, where the President then disembarked to attend a rally being held in a hanger located at the airport. Following the rally, the President left the airport by motorcade to attend to other matters in the Columbia area. The Defendant was present at the airport that day for the purpose of protesting against some of the President's policies. During the course of these events, Defendant was arrested by law enforcement officers, and was subsequently charged by the United States in a one count information with a violation of § 1752 (a)(1)(ii).

Issues to be resolved are whether the Government has proved beyond a reasonable doubt that the Defendant violated the statute at issue, and also whether the Government has attempted to enforce the statute in an unconstitutional manner, and/or whether the Defendant has been the subject of a selective prosecution. Defendant also has a pending motion for judgment of acquittal pursuant to Rule 29, Fed.R.Cr.P. In rendering a decision in this case, the Court must state its specific findings of fact in open court or in a written decision or opinion. Rule 23(c), Fed.R.Cr.P.

After consideration of the evidence and testimony presented at trial, as well as the additional arguments presented both at trial and by way of post-trial briefs, the Court finds and rules as follows:

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### I.

#### (Violation of Statute)

In order to obtain a conviction under 18 U.S.C. § 1752(a)(1)(ii), the Government must prove beyond a reasonable doubt that the Defendant

- 1) willfully and knowingly entered or remained in,
- 2) any posted, cordoned off, or otherwise restricted area of a building or grounds where the President or other person protected by the Secret Service is or will be temporary visiting,
- 3) in violation of the regulations governing ingress or egress thereto.

There are several issues which must be addressed in determining whether the Defendant violated this statute, with the main issue argued at trial being whether the Defendant was even in a restricted area at the time of his arrest. After careful consideration of the facts and evidence presented, the Court finds that the Defendant was in a restricted area as defined by the statute at the time of his arrest. The testimony and evidence establishes that the area around the hanger where the President was to be speaking, and from where his motorcade would be leaving, was staffed by law enforcement officers beginning several hours prior to the President's arrival. Once members of the public began arriving for the event, they were advised of where to park and where

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to get in line to enter the building for the rally. The event was restricted to ticket holders only. The evidence further showed that, because the main road in and out of the airport ran right next to the hanger, vehicles were allowed to traverse up and down the road prior to the arrival of Air Force One, but that only through traffic was allowed. Automobiles were not allowed to stop in this area, they could only pass through, and once Air Force One had landed, all vehicular traffic through the area was halted. Similarly, while foot traffic was allowed through the area, with ticket holders for the event being directed where to go to get in line to enter the hanger, there was no evidence presented that anyone identified by law enforcement as not having a ticket for the event was allowed to remain or, in effect, "hang out" in the area around the hanger where the President would be speaking. The evidence also showed that, once the President had arrived, the area where the President would be approaching the hanger was cleared even of ticket holders waiting to get into the building. The area around the hanger also remained cleared upon the President's departure, as the evidence established the President's motorcade would be moving slowly from the building and around an adjoining intersection before proceeding out to the main road down Airport Boulevard. Again, this evidence clearly establishes beyond a reasonable doubt that the area around the hanger was a restricted area under the statute.

The Court also finds beyond a reasonable doubt that the Defendant both willfully and knowingly remained in this restricted area after he had been instructed to leave. The testimony and evidence shows

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that the Defendant was initially in a grassy area near the sidewalk located right next to the hanger and right next to the area where the President's motorcade would pull up for the President to exit his car to enter the hanger. Defendant was literally within a few yards of where the President's automobile would be parked. When the Defendant was advised that he could not remain in that location, he proceeded to cross Airport Boulevard diagonally to the far corner of the intersection across from the hanger. However, even in this location, the Defendant remained in close proximity to the hanger, as well as being on the corner of the intersection where the President's automobile would have to exit the parking lot and make a slow u-turn onto Airport Boulevard before being able to speed up and travel down the boulevard to the main road. The evidence before this Court establishes that the Defendant was again advised that he could not remain in that location and would have to leave the area, and that he refused to do so. Therefore, the Court finds that the Government has established beyond a reasonable doubt that the Defendant willfully and knowingly refused to leave that location and remained therein.

Finally, the Court finds beyond a reasonable doubt that the Defendant knowingly remained in this restricted area in violation of the regulations governing ingress or egress thereto. The regulations governing ingress or egress provide that, in order to remain in a restricted area, a person must be either an invitee; a member of the protectee's family or staff; military or communications personnel assigned to the Office of the President; federal, state or local law enforcement personnel engaged in the performance of their official

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duties; or holders of grants of easement to the property with proper authorization. 31 C.F.R. § 408.3. The only category in which the Defendant could possibly have belonged under the facts of this case was that of an invitee.<sup>1</sup> However, the evidence clearly establishes that the Defendant was not a ticket holder for the event, nor was he there to attend the event. Hence, it was a violation of the regulations "governing ingress or egress thereto for the Defendant to have remained in the restricted area.

Therefore, the Court finds that the Government has proved the Defendant's violation of each element of the statute beyond a reasonable doubt.

### II.

#### (Constitutionality of Enforcement)

The next question to be addressed by the Court is whether the Government's prosecution of the Defendant has been conducted in an unconstitutional manner and/or whether sufficient evidence has been submitted to justify an evidentiary hearing on the issue of selective prosecution. The Court is careful to note, however, that this does not mean the Court has a role in deciding whether this case, or any case, should have been prosecuted. Whether the Government should have, in the exercise of its discretion and under the facts of this case, charged the Defendant with a violation of this statute and pursued prosecution of this

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<sup>1</sup>Invitees are defined as "persons invited by or having appointments with the protectee, the protectee's family, or members of the protectee's staff." 31 C.F.R. § 408.3(a)(1).

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case is a decision solely reserved for the Government to make, and for the public to debate. Borden Kircher v. Hayes, 434 U.S. 357, 364 (1978); Oyler v. Boles, 368 U.S. 448, 456 (1962). Once the Government chooses to prosecute a charge, the Court (when acting as factfinder) must then decide whether the elements of the charge have been proven beyond a reasonable doubt, and also whether in this particular case the government has enforced the statute in an unconstitutional manner or subjected the Defendant to a selective prosecution. Id.

With respect to the question of enforcement, the Court has already determined that the statute itself is constitutional; see order filed October 20, 2003; nevertheless, like any statute, § 1752(a)(1)(ii) cannot be enforced in an unconstitutional manner. In making this assertion, the Defendant argues that enforcement of this statute against him under the facts presented is unconstitutional because the parameters of the restricted area were "vague and ambiguous", that he was never told what the boundaries of the restricted area were, and since there was no way for him to know where he could go to exercise his right to protest, the vague application of this statute is what led to his having been charged. Defendant also argues that individuals with signs favorable to the President were allowed to remain in the supposedly restricted area, and that the only reason he has been charged in this case is because he was protesting against the President. The evidence presented at trial does not support these arguments.



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First, the evidence shows that the Defendant was arrested because he refused to leave the area immediately adjacent to where the President would be arriving and departing in his vehicle, not because the boundaries of the restricted area were "vague" or because he didn't know what the boundaries of the restricted area were. The site agent for the President's visit testified that the restricted area consisted of an area about 100 yards up from the hanger to the parking lot, to the right of the hanger down Airport Boulevard to the intersection of Airport Boulevard with the main highway (Hwy. 302), and to the left of the hanger down Airport Boulevard for about 100 yards to the next intersection. The area immediately below the hanger was the tarmac and runway for the airport. While the Defendant correctly notes there were no barriers or other indicia of a boundary surrounding this area, and that both vehicular and pedestrian traffic traveled through this area leading up to the President's arrival, these facts in and of themselves do not provide a basis for a claim of unconstitutional enforcement of the statute. Both foot and vehicular traffic by necessity had to travel through this area for people to come to the event, and it was also necessary to keep the area open for travel to and from the airport itself. Nevertheless, the evidence showed that law enforcement agents were stationed at the perimeters of the area and were patrolling inside the area. The Secret Service's policy, as testified to at the trial, was that no one other than ticket holders were supposed to come into this area and remain, as opposed to just passing through. Then, upon the President's actual arrival at the airport, the area, and in particular the area immediately around the hanger, were to be cleared of

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even "pass through" vehicular and pedestrian traffic. The Court can find nothing unreasonable about this policy under the facts and circumstances of this case, nor is the alleged "vagueness" of the restricted area's boundaries what led to the Defendant's arrest.

The Defendant also complains that the parameters of the restricted area were too broad, and that to allow the Secret Service to set up a restricted area of this size denies citizens the right to effectively protest and assert their first amendment rights. The Court is sympathetic to these concerns, and agrees with the Defendant that the Government may not, under the guise of performing a security function, seal off government officials from criticism or unduly restrict the First Amendment rights of citizens to engage in peaceful protest. Cf. Zwicker v. Koota, 389 U.S. 241, 250 (1967) [Protection "may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms"]. However, the issue in this case is not whether the outer boundaries of this restricted area were unreasonable. The Defendant was not at the outer boundaries, or even close to those boundaries. Rather, he was initially in a grassy area right next to where the President's car would be pulling up and where the President would be exiting the vehicle, following which he moved across the street right next to where the President's limousine would be slowly making a u-turn when he left the rally. The site agent testified that this area needed to be secured because it was the emergency egress for when the President's motorcade departed, was in close proximity to the arrival area, and was close enough that someone

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standing there could cause harm from "[a]nything from pistol fire to throwing rocks to introducing a chemical or biological agent in the air in that area." In this age of suicide bombers, where people are willing to strap explosives to themselves to literally become walking bombs, the Secret Service's concern with allowing unscreened persons to stand in such close proximity to a slow moving vehicle carrying the President of the United States is not just understandable, but manifestly reasonable. Cf. United States v. O'Brien, 391 U.S. 367, 377 (1968) ["[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."]. The Defendant does not dispute that it is within the constitutional power of the federal government to protect the President of the United States, and concedes that protection of the President furthers an important or substantial governmental interest. See Defendant's Reply Brief, pp. 1-2 ["Aside from the defense of this country by military, there is no greater obligation for the federal government than the protection of the President."] While the Defendant argues that he posed no danger to the President, and indeed there was no evidence presented at trial to show that the Defendant intended any harm or at any point ever posed an actual danger to the President, the Secret Service does not have the luxury of assuming

such to be the case with respect to any individual during the unfolding of an actual event.<sup>2</sup>

This is not to say that the Secret Service's power to restrict the area around the President is absolute. Nor are protestors required to go to designated demonstration areas, as long as they do not otherwise remain in a properly restricted area. The Court also does not accept the Government's argument (presented in an earlier brief) that Courts in general should not be second guessing security decisions made by the Secret Service and law enforcement personnel. By bringing prosecutions under this Statute, the Government is by necessity drawing the Courts into the debate over how far the Government can go in restricting the rights of protestors and others in the exercise of their constitutional rights; cf. Sherill v. Knight, 569 F.2d 124, 128 n. 14 (D.S.C. 1977); and the further away a protestor is from where the President or any other protectee is located, the more he or she will be able to effectively argue that the balance between security for the protectee and the right of the individual to engage in protest tips in the protestor's favor. Hence, if the Defendant had chosen to keep moving further and further away from the hanger, and if he had still been arrested, not at the location where he was, but at a much further distance from the hanger, he would have

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<sup>2</sup>Even if the Defendant contends he could have been screened at that location, that is not the point. The Defendant is not an island, with rights unto himself not shared by others. If the Defendant had a constitutional right to stand in that location, and the Secret Service did not have the power and authority to require him to move, then the Service similarly would not have had the power and authority to move other citizens who also wanted to stay in that location.

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had a stronger case that the Government's actions were unreasonable and therefore unconstitutional. Again, however, that is not what happened in this case. The Defendant effectively sealed his own fate when he chose to make his principled stand in a location manifestly reasonable for the Secret Service to make secure.

Nor does the evidence support Defendant's claim that the only reason he was charged in this case was because he was protesting against the President. There was no evidence presented at the trial to show that any other persons, either supporting the President or opposing him, were allowed to remain in the area around the hanger for the purpose of demonstrating, pro or con, upon the President's arrival. The evidence did show that there were many people, some of whom may have had signs supporting the President, who were there that day to attend the rally inside the hanger. However, the evidence shows that these people either went through the screening into the hanger for the rally, or were themselves cleared from the area prior to the President's arrival at the hanger.<sup>3</sup>

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<sup>3</sup>Defendant also presented evidence at the trial to show that signs supporting the President had been placed in the ground inside the restricted area along the route of Airport Boulevard. No evidence was presented, however, that the Defendant or any of the Defendant's other witnesses attempted or even wanted to place their signs on the ground alongside these other signs. Indeed, when the other individuals who were there to protest against the President decided to leave when they were instructed they could not remain in that area (Defendant being the only one who stayed and refused to leave), the testimony was that these individuals purposely took their signs with them so they could use them in another location.



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Finally, Defendant has failed to present any evidence to show that he was the victim of selective prosecution in this case. In order to succeed on this claim, "[t]he defendant bears the burden of proving a 'colorable entitlement,'...to the claim of selective prosecution. Some credible evidence must be adduced indicating that the government intentionally and purposely discriminated against the Defendant by failing to prosecute other similarly situated persons." United States v. Torquato, 602 F.2d 564, 569-570 (3d Cir.), cert. denied, 444 U.S. 941 (1979).

To support a defense of selective or discriminatory (sic) prosecution, a defendant bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

Id. at 569, n. 8 (quoting United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974). See also United States v. Olvis, 97 F.3d 739, 743 (4th Cir. 1996); United States v. Richardson, No. 96-4445, 1997 WL 342610 at \*\*2 (4th Cir. June 23, 1997), cert. denied, 522 U.S. 1006 (1997); United States v. Culliton, 328 F.3d 1074, 1081 (9th Cir.



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2003); United States v. Kelley, 152 F.3d 881, 885-886 (8th Cir. 1998); United States v. Olvis, 97 F.3d at 746.

"Further, the focus of the selective prosecution inquiry is on the federal prosecutor, and the Defendant must therefore show that the federal prosecutor has purposefully and intentionally discriminated. United States v. Conley, 859 F.Supp. 909, 937-938 (W.D.Pa. 1994); see also United States v. Schoolcraft, 879 F.2d 64, 68 (3rd Cir. ), cert. denied, 493 U.S. 995 (1989). Defendant has made no such showing in this case.

Defendant has presented no evidence to show that *any other person*, either supporting the President or opposing his policies, entered and remained in the restricted area with no ticket and no intention of attending the rally, and then refused to leave the restricted area when so instructed. Specifically, there was no evidence presented to show that any supporter of the President was present that day who did not have a ticket and did not enter the building to attend the rally, but nevertheless was allowed to remain in the secure area without being prosecuted, nor was there any evidence presented to show that other individuals who were there to demonstrate against the President received such favorable treatment. The Defendant was the only one who refused to leave the area when instructed to do so. "While the decision to prosecute an individual cannot be made in retaliation for his exercise of his first amendment right to protest..., the prosecution of those protestors who publicly and with attendant publicity assert an alleged personal privilege . . . as part of their protest is not selection on an

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impermissible basis." United States v. Catlett, 584 F.2d 864, 867 (8th Cir. 1978).

Under these facts, there is no evidence that the Defendant is a victim of selective prosecution, because there is no evidence that others similarly situated have not generally been proceeded against for engaging in like conduct, nor has Defendant presented any evidence that the prosecutor in this case brought this prosecution out of a desire to prevent the Defendant from exercising his constitutional rights. Indeed, the evidence presented at trial shows that the Defendant has engaged in this exact same conduct (protesting against the President's policies) during other Presidential visits to this state; without incident or interference from the federal government in general or the United States Attorney's office for South Carolina in particular. This claim is without merit. United States v. Catlett, 584 F.2d at 866; Wayte v. United States, 470 U.S. 598, 604-609 (1985). See also United States v. Greenwood, 796 F. 2d 49, 52 (4th Cir. 1986).

### III.

#### (Pending Motion for Judgment of Acquittal)

In moving for a judgment of acquittal at the close of the prosecution's case, defense counsel argued that the Government had failed to present sufficient evidence to prove its case. However, the evidence shows that during the Government's case in chief, witnesses were presented who testified that agents arrived on the scene that morning to secure the area, a security sweep was performed, and the site was otherwise readied for a presidential visit. Agents were

## Appendix 62

posted interspersed throughout the restricted area, with the public being told where to park for the event and where to go to get in line to enter the hanger for the rally. Witnesses further testified that through traffic was permitted up until the arrival of the President, at which time even through traffic was prohibited. The Government's witnesses also testified that the Defendant was present in the area immediately adjacent to the hanger that day, that he was advised he could not remain in that area and would have to leave, and that the Defendant ultimately refused to leave the area as instructed. The Government's witnesses also testified that the Defendant was not there to attend the rally, nor did he have a ticket to attend the rally, but was there to protest.

The Court does not find that the Defendant is entitled to a judgment of acquittal under Rule 29, Fed.R.Cr.P., based on this evidence, and his motion is therefore denied. Cf. United States v. Moran, 312 F.3d 480, 488 (1st Cir. 2002), United States v. Abner, 35 F.3d 251, 253 (6th Cir. 1994).

### Conclusion

Based on the foregoing, the Court finds that the Government has proved beyond a reasonable doubt that the Defendant violated each element of Title 18 U.S.C. § 1752(a)(1)(ii), and he is therefore adjudged guilty of the charge set forth in the one count information filed in this case.

**IT IS SO ORDERED.**

Appendix 63

/s/ Bristow Marchant  
United States Magistrate Judge

Columbia, South Carolina

January 5, 2004

Appendix 64

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

FILED  
September 8, 2005

No. 04-4832  
CR-03-309

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

BRETT A. BURSEY

Defendant - Appellant

---

DKT LIBERTY PROJECT; PEOPLE FOR THE  
AMERICAN WAY; NATIONAL LAWYERS' GUILD;  
FIRST AMENDMENT FOUNDATION; PEOPLE FOR  
THE ETHICAL TREATMENT OF ANIMALS;  
PEOPLE'S LAW OFFICE OF CHICAGO

Amici Supporting Appellant

---

On Petition for Rehearing and Rehearing En Banc

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[ENTERED: SEPTEMBER 8, 2005]

## Appendix 65

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Motz, Judge King, and Judge Siler.

For the Court,

/s/ Patricia S. Connor  
CLERK



Appendix 66

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION

UNITED STATES OF AMERICA	)	
	)	CRIMINAL NO.
	)	3:03-309
v.	)	
	)	NOTICE OF
	)	APPEAL
BRETT BURSEY	)	
	)	

[ENTERED: SEPTEMBER 24, 2004]

Notice is hereby given that Brett Allen Bursey, defendant in the above named case, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the "Order on Appeal" entered by U. S. District Court Judge Cameron Currie, filed on September 14, 2004.

Appellant's Counsel:  
P. Lewis Pitts (ID# 3068)  
200 Mendenhall St. #8  
Greensboro North Carolina 27403  
336-378-9374

/s/ P. Lewis Pitts  
P. Lewis Pitts

Appendix 67

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION

United States of America	)	
	)	
	)	Criminal
vs.	)	#: 3:03-0309
	)	
Brett Bursey	)	
_____	)	

NOTICE OF APPEAL

[ENTERED: JANUARY 13, 2004]

Pursuant to 18 USC 3402 Brett Bursey hereby serves Notice of Appeal from the Judgment in a Criminal Case imposed by the Honorable Bristow Marchant, USMJ, on January 6, 2004 in the above captioned matter.

Submitted this 13th day of January 2004.

/s/ Lewis Pitts

Lewis Pitts, Esq.  
1030 Carolina Avenue  
Durham, NC 27705  
(919) 416-1762  
Federal Court # 3068

Appendix 68

Jeffrey E. Fogel, Esq.  
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666 Broadway, 7th Floor  
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COUNSEL FOR BRETT BURSEY

Appendix 69

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION

United States of America	)	
	)	
vs.	)	Criminal
	)	#: 3:03-0309
	)	
Brett Bursey	)	
_____	)	

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the above Notice of Appeal on Assistant USA John Barton by hand delivering a copy to his office on January 13, 2004.

/s/Gerald L. Rudolph

Appendix 70

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION

UNITED STATES OF AMERICA,	) Cr. No. 3:03-309
	)
	)
VERSUS	) Columbia, S.C.
	) November 12, 2003
BRETT BURSEY,	)
	)
Defendant.	)
<hr/>	)

VOLUME I  
TRANSCRIPT OF NON-JURY TRIAL  
BEFORE THE HONORABLE BRISTOW MARCHANT  
UNITED STATES MAGISTRATE JUDGE

Appearances:

For the Government:	JOHN BARTON, ESQ. Assistant U.S. Attorney 1441 Main Street, Suite 500 Columbia, S.C. 29201
For the Defendant:	LEWIS PITTS, JR., ESQ. 1030 Carolina Avenue Durham, N.C. 27705
	C. RAUCH WISE, ESQ. 305 Main Street Greenwood, S.C. 29646-2757

## Appendix 71


Court Reporter:

Gary N. Smith, CM  
1845 Assembly Street  
Columbia, S.C. 29201  
(803) 256-7743

### STENOTYPE/COMPUTER-AIDED TRANSCRIPTION

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\*\*\*

 A. Just to effect the commerce of the area, allow airport business to be conducted. And we let them pass through, we don't let them stay. We would let them pass through.

Q. Okay. You can take your seat back.

Is it -- does the United States Secret Service on a visit such as this ever completely close all access to a restricted area?

A. On a visit such as this there's -- no.

Q. How about -- at no point is access --

A. Well, at some point, right when the president is about to arrive, we shut down all access, even to Airport Boulevard, in this case, to all traffic and all foot traffic, yes.

Q. What if somebody has got a ticket?

A. They wouldn't be allowed in at that point.



## Appendix 72

Q. Why is that done?

A. For the same reason — well, its so that no one can cause — cause the president harm. At that point they are not — they are in our secure or restricted area, but they are not screened until they come to the building.

And with his arrival being imminent, we don't want anyone who is unknown, but may be authorized to be there but unknown to us — for example, someone with a ticket — in that area.

Q. Are there individuals who are known — how do you determine who is allowed in that area, once it's completely shut down?

\* \* \*

THE COURT: Show us where the general public area was on this map.

THE WITNESS: Well, the general public area — this is all still restricted area. The general public area would have been beyond, about 100 yards up, like I told you earlier, up Lexington Avenue, to the next intersection down on the left of the map, to 302, and also around Doolittle Hanger to the edge of the bike rack, which technically really isn't public because it's inside of an airport Tarmac, and around basically the whole side of this — left side of this diagram.

THE COURT: Well, that whole side of that diagram was in the posted area?

## Appendix 73

THE WITNESS: Yeah, I would say up to about - we had - this is Eagle Aviation on the left side of this diagram.

THE COURT: Right.

THE WITNESS: Up to about Eagle Aviation, is where we kept this. Of course, this was Tarmac, so it is already restricted access anyway.

THE COURT: Right

THE WITNESS: So, what we are really talking about, as far as everything from the next Intersection down -

THE COURT: Anything to the left of that intersection?

THE WITNESS: Everything down to 302 - I'm sorry, 302 this way, to the right of the diagram, to the next intersection this way, which I don't know the name of this street, and up to the 100 yards past the intersection of Lexington and Airport Boulevard.

\* \* \*

A. It may have been a little closer, but I don't know.

Q. Now, I believe you told the judge that was a restricted area, but it wasn't a restricted area except for a certain time frame, correct?

## Appendix 74

A. No, it's all a restricted area, from the time we put up our perimeter, but we allowed - to allow airport commerce, we let some people go through.

Q. So, when did you put up your perimeter?

A. 7:30 in the morning.

Q. So, from 7:30 that morning until the president had departed, that entire area that you have described was deemed to be a secure area?

A. A restricted area, yes. But we do allow some people to pass through that area.

Q. About 4,000 that day, correct?

A. Yeah, they were invited guests authorized to be there, and also people that had business down Airport Boulevard. We - just to avoid affecting commerce, we have to facilitate that.

Q. So, help me again with the idea of you restricted it starting at 7:30, but then it was open at some point, and then it closed at some point?

A. It was restricted from 7:30 in the morning until the president left Doolittle Hanger. But during that - the restrictions doesn't mean people can't pass through our secure area or our restricted area.

Q. And who is making the discretionary decision about who can go in that area and who can't go in that area?

## Appendix 75

Is there one individual that is making that discretionary call?

A. Well, there's probably many, actually, police officers -- "Do you have a ticket for this event? Go park there. If you are going to the airport, go ahead up here --"

Q. So, the lifting -

A. "If you are going to school, go that way."


Q. So, the lifting or dropping of the secure area is not limited to Secret Service personnel?

A. No, that's still -- that's not lifting or dropping it. When we -- if we really -- it's not lifting it. It's still a restricted area.

If you have business in there, you can pass through that area, until, of course the president is on imminent arrival. Then we shut it all down for no traffic at all, which only inconveniences businesses in the airport, at the airport, and down Airport Boulevard for a short period of time.

Q. But my question is, who has the authority to exercise the discretion to decide who has business within there such that they are allowed to go within that very largely restricted area? Is it limited to just Secret Service agents?

A. No, we instructed the police also if they -- if somebody had to pass through our restricted area, they could do it.



## Appendix 76

If they had business at the airport, or if they said they had business at the airport, and didn't otherwise — if they didn't otherwise display some action that would say they didn't have business at the airport.

\* \* \*

Q. That turned off of 302 onto Airport Boulevard heading toward Doolittle Hanger?

A. At 302 and Airport Boulevard, no, there was not. There was a police officer there.

Q. There was a police officer?

A. (Nods head in the affirmative).

Q. Did the police officer stop every vehicle?

A. I don't think so.

Q. And in fact hundreds, or at least enough vehicles to transport over 4,000 people, were allowed to turn down that highway, correct?

A. Correct. I believe they were screened at a later point and asked where they were going and their intent.

Q. And whatever they said was taken at face value?

A. Unless they — yes, it was taken at face value unless they indicated some other actions that would say they weren't going to do what they say.

## Appendix 77

For example, if they said they were going to the airport and set up a picnic, like I said before, right there on the hanger ground, that's not going to the airport for commerce.

Q. Now, I believe you testified previously that when you first saw Secret Service Agent Abel speaking to someone, it was in the grassy knoll area there near the intersection of Airport and Lexington on the hanger side of Airport?

A. That general vicinity, yes.

Q. And I believe you also testified at that point that the area was not closed at that point, correct?

A. It was a restricted area at that point, yes. It was a restricted area, but closed to — closed to every unknown unauthorized individual? Not at that point.

Q. It was restricted but not closed? Am I hearing you right on that?

A. When I say "closed," I mean sterile area right before the president arrives, correct. It was restricted from 7:30 on.

Q. And "restricted" means you can't be in there unless you are an invitee?

A. You can't remain there unless you are an invitee or authorized - "authorized" meaning law enforcement, communications folks, staff, people that had to work at the hanger.



Appendix 78

Q. So, there's a difference in restricted and closed?

A. There is a difference between the level of restriction we are implementing at that time. We have to allow commerce, we can't just shut down everything for -

Q. Isn't that an argument for maybe being a little more precise on when you describe an area to be secured and restricted so that -

MR. BARTON; Your Honor -

MR. PITTS: I would like to finish my question.

\* \* \*

MR. BARTON: Your Honor, I'm going to object again. This isn't a question for him. That might be a question for Your Honor, but that is not a question for this witness.

THE COURT: Well, he ran ask him what is the Secret Service - assuming they have instructions in that area - what those instructions are with respect to dealing with demonstrators who want to demonstrate, exercise their First Amendment right. Does the Secret Service have a policy of how to deal with them, what is the policy, how are demonstrators dealt with on this day, all those -

MR. BARTON: That was not that question.

## Appendix 79

BY MR. PITTS:

Q. Well, Agent Cohen, does the Secret Service have a policy that gives you guidance on how to balance protection of the president with protection of First Amendment rights?

A. We are instructed to -

Q. My question is, do you have a policy? Is there a Secret Service policy?

A. I'm not familiar with that policy. We may or may not.

Q. All right. The decision to deem restricted, but not closed, 302 at Airport Boulevard and the other end of Airport Boulevard at some distance you are not sure - at the next intersection down there - was that decision yours?

A. I think in conjunction with the police.

Q. In conjunction with the police?

\* \* \*

verbiage?

A. No, your verbiage. That's what I meant by that. As part -

Q. Was there anything that is different from the way I'm saying it, but got to the essence of, did you all

## Appendix 80

discuss in that meeting with your supervisor from Washington —

A. No, he was —

Q. — that this area might be too broad, in light of the need to protect and not chill First Amendment rights? Was there any such discussion during that meeting?

A. No.

Q. Okay. Just one minute.

Agent Cohen —

A. Yes.

Q. - where were tickets checked on October 24th to see if people had their tickets?

A. I believe they were checked at two different points. The only point that I concerned myself with was prior to the metal detectors. There — I believe the police and a staff volunteer checked them additionally when they were coming by the intersection of Lexington and Airport Boulevard, but they were actually taken right prior to the metal detectors.

Q. And the metal detectors you are describing there on the chart, the government —

A. To the right of that, to the right of Doolittle Hanger.

## Appendix 81

Q. To the right of Doolittle Hanger. And then you think there was another spot?

A. I'm certain of it.

Q. Where was it?

A. Somewhere in the vicinity of Airport Boulevard and Lexington, but I don't know exactly where.

Q. Well, wouldn't that be an essential aspect of the security plan to know where the tickets were checked?

A. No, because that is a staff concern. From a Secret Service standpoint, as long as people get screened to come into a venue, they are, in my opinion, secure.

But the staff invites people to come to venues and it's their job to control who they invite and who they allow in.

So, as long as they were being checked at some point by staff to insure that they didn't get people inside that they didn't want there, then I don't really concern myself with it. I consider it the general public anyway.

Q. I'm sorry, you consider what —

A. I consider the invited people there as general public, because I don't know them. They are not known to the Secret Service, especially in this scenario, 6,000 people. So, we consider them general public.

## Appendix 82

Now, the staff is the person who issues tickets, and tickets to people, and they are the ones who take tickets. We don't involve ourselves in that.

\* \* \*

THE COURT: The agent's testimony is that this area coming right up from the building, going up to Airport Boulevard — he testified 100 yards north, 100 yards west, and I guess all the way down to 302, they considered that secure — I think he's testified earlier because that is an area where people could — if they had a gun or they could throw a rock or if they had gas or some kind of chemical agent, you want to keep them a certain distance away. But — and that's his explanation for this particular diagram, about the distances they decided upon, that was the testimony.

MR. BARTON: That's correct.

THE COURT: I don't know if 100 yards is standard or not. And I don't blame the agent for not wanting to actually say, "Well, this is what we always consider standard," but —

MR. BARTON: I would object and ask -

THE COURT: His testimony for purposes of this hearing is that you went 100 yards north, 100 yards west, and to then to the east, and all the way to 302, because that's the route the car would be going down, right?

Appendix 83

THE WITNESS: That's correct. I'm not even sure of the distance to the west, but -

BY MR. PITTS:

Q. I believe - let me see if I can clarify, because I think there was a mistake in fact -

THE COURT: That's what his earlier testimony was, I think.

\* \* \*

Q. I think earlier you referenced the intersection of Airport Boulevard and 304, did you mean Airport Boulevard and 302?

A. Yes, I apologize.

MR. BARTON: That's all I have, Your Honor.

MR. PITTS: Nothing further.

EXAMINATION

BY THE COURT:

Q. Agent Cohen, let me ask, you testified you got there early in the morning?

A. Right.

Q. And you started setting up about 7:30?



## Appendix 84

A. Correct.

Q. And you had police officers, not necessarily Secret Service Agents, but police officers posted at what you considered to be the perimeter of what you wanted to be your restricted area?

A. Yes.

Q. So, you had somebody at the intersection of Airport Boulevard and 302?

A. Right.

Q. Somebody at the intersection of Airport Boulevard and Lester Bates Boulevard?

A. Yes.

Q. And then you had somebody up that other road at the - there's a parking lot up there?

A. Correct.

Q. Correct? Now, but prior to the president's arrival, they weren't stopping people coming in and out, were they? Like, if a car pulls off 302 onto Airport Boulevard, the officer down there is not stopping them?

A. That's correct.

Q. They just go on - and as long as that car doesn't stop

—

## Appendix 85

A. That's correct, they are allowed to go through.

Q. So, there wasn't anybody checking anybody prior to when the president was fixing to land at the airport; is that correct?

A. The police may have at some point, further down the road, asked — asked people to help — it's confusing when you pull into a venue like this, there is all kind of police around, people may not know, so —

Q. Somebody may have themselves stopped and asked a question —

A. Well, the traffic tends to slow down and get backed up when this many people come to this sort of event, given the amount of time that is concerned here. You know, 6,000 - or 4,000 people show up within an hour or two —

Q. Well, the police were not stopping anybody?

A. I don't think they were actually stopping somebody, but I don't know,

Q. Now, this parking lot — you had to have a ticket to get into the event?

A. Correct.

\* \* \*

THE COURT: Okay, all right.

Appendix 86

THE WITNESS: Still at the intersection of Airport and Lexington.

THE COURT: All right.

A. And when I gave him these choices, at that point it had not only become just restricted to ticket holders, at that point it had become restricted to everybody except law enforcement.

BY MR. BARTON:

Q. Okay. Well, before that, was he joined with anybody at that corner? Was he still alone at that point?

A. No, then three individuals joined him at that point.

Q. Can you describe them? Do you know -

A. There were two men and a lady.

Q. And what were they doing?

A. They were there to do the same thing he was there - demonstrate. And they - we explained the same thing to them about the demonstration area. They were familiar with the location as well.

Q. How do you know they were there to demonstrate?

A. They - some of them actually had the signs in their hands at one point. They never lifted - I never saw anybody lift the sign.

Appendix 87

Q. Okay. Did Mr. Bursey have a sign in his hands at any point?

A. I never saw him lift them.

\* \* \*

24th, were you a part of any meetings or briefings where there was a discussion about balancing the interests of protecting the president with the rights of citizens to exercise free speech rights?

A. No.

Q. That was never discussed?

A. No.

Q. Has that ever been discussed in any of your other security detail assignments since you have been in the Secret Service?

A. No. We are always told where there's a demonstration area that's been -- when local law enforcement designates one, we are always made aware of where that is. That's the only --

Q. And if you are going to demonstrate, that is the only place you can do it; is that your understanding of the policy?

A. Yes. They are directed to that demonstration area. And a lot of it is for their own safety concerns. You don't want people jumping out in front of a motorcade.

## Appendix 88

Q. Now, did you have any participation in selecting the motorcade route?

A. No.

Q. Agent Abel, in the terminology or the abbreviations that are used in your professional work, if there was an e-mail from headquarters to CSC - would that be Columbia, South Carolina, or what would CSC - what would that stand for?

A. I - I don't know. I guess Columbia. Maybe the field

\* \* \*

A. I asked him to leave the area, yes, that is -I told him he could go home, he could get in line if he had a ticket, he could go to the demonstration area, or he would have to suffer the consequences and be arrested. And he said, "I want to be arrested." As far as what the airport police told him when they arrested him, I have no idea.

Q. Well, what I'm asking is, in your mind do those four options equal how it's stated here, which is a request to leave airport property?

THE COURT: She can testify about anything that she has knowledge of. If she doesn't know what this document is -

Appendix 89

BY MR. PITTS:

Q. Right. Regardless of this document, the document is behind my back -

MR. BARTON: Then what is the relevance of this whole line of questioning?

THE COURT: Don't ask her about this document -

MR. PITTS: I'm not.

THE COURT: - ask her about what -

MR. PITTS: Let's put the document way over here.

THE COURT: - what she knows.

BY MR. PITTS:

Q. On that day was Mr. Bursey and other folks with him asked to leave airport property?

A. Well, going home would be leaving airport property, and

\* \* \*

the site.

Q. And did you know that he had made a request to meet with the authorities to work out an area that was



## Appendix 90

agreeable to the security people, as well as to the citizens who wanted to exercise their rights?

A. Like I said before, Mr. Bursey appeared, his name never came up in conversation. I had no knowledge of Mr. Bursey until he appeared.

MR. PITTS: Just a minute, Your Honor.

I have a few more questions, Your Honor.

THE COURT: Go ahead.

BY MR. PITTS:

Q. Agent Abel, it is true that a person could have been in line outside the hanger there without a ticket, isn't that true? Because you told us that the officers, you don't know if they were requiring them to show a ticket or just asking if they had it?

A. Correct. If a person didn't tell the truth, they lied to the officer, then they could have not - like I said, I don't know that they had to show it to them or not

Q. All right. Now, when you were standing on the north side of Airport Boulevard where Mr. Bursey was at this second location, not the first location, on the north side of Airport Boulevard with other people, and was being told he needed to, leave or these options, at that point in time there were other people standing on the south side of Airport Boulevard waiting in line, were there not?

## Appendix 91

A. Correct.

Q. And in fact Mr. Bursey had asked you, did he not, why was he being arrested when these other folks were standing over there even closer to the hanger than he was? Do you remember him asking you that?

A. Well, I told him, I said, "They have tickets -"

Q. Do you remember him asking you that?

A. Well, I didn't arrest him initially. I gave him the option.

Q. Do you remember him asking you about people who were over there on the hanger side of Airport Boulevard at that time?

A. Yes.

Q. Okay. And there were in fact people who were stretched in line, were there not, all the way back from Doolittle Hanger back up into around the very same intersection where he was, was there not?

A. Until it was shut down. Once it was shut down, those people were not there. And they had tickets.

Q. But at the time you were telling Mr. Bursey and his friends he had to leave, those other people were standing right out there, were they not?

A. Because they had tickets. He could do the same if he had a ticket.

## Appendix 92

Q. Well, you just told him - you don't know if those people had tickets or not, do you?

A. They - I guess Mr. Bursey could have lied to the police officer and said he had a ticket too.

Q. You didn't know because you hadn't done a check of the people that were standing out here in line, had you?

A. A physical check of seeing their ticket?

Q. They didn't show you the ticket?

A. No, that was not my job. It was the local law enforcement.

Q. And approximately how many people would you say were lined up here south of Airport Boulevard, waiting outside and around the area of Doolittle Hanger?

A. I have no - I couldn't -

Q. Is a fair number 50? Is that reasonable?

A. 50 or less, yeah.

Q. 50 or less. Okay. Well, the photograph that Mr. Barton showed you indicating a look at this strip, this grassy strip in here, there are no signs in the ground in those photographs, were there?

A. No.

## Appendix 93

Q. Okay. On that day, October 24th, this strip here that is south of Airport Boulevard was filled with political signs in the ground, was there not, supporting candidate?

A. To be honest, I don't remember seeing any signs.

Q. As you are roving around in all of these 4,000 people that

\* \* \*

Q. Who made the decision to have Mr. Bursey arrested?

A. Mr. Bursey did. He said, "I want to be arrested. I want to go to jail."

Q. What did he charge himself with?

MR. BARTON: That's two different questions, Your Honor. Who arrested him, that's one thing. But who made the decision, I mean, I —

THE COURT: Who was the law enforcement officer or personnel that made a decision to effect the arrest?

THE WITNESS: That arrested him? Airport police arrested him.

Appendix 94

BY MR. PITTS:

Q. And did you direct airport police to make that arrest?

A. I notified Lexington County - well, the Lexington County police officer was present the entire time. He radioed the airport police, they responded. I explained to them the circumstances. And if s their ground, it was their decision what to do as far as removing him, arresting him.

Q. But the truth is you requested, did you not, the airport police to arrest Mr. Bursey?

A. I requested -

Q. That's what happened.

A. - the airport police to respond. I can't tell the airport police what to do.

Q. Well, I'm not using the word "tell" or "instruct" or

\* \* \*

THE COURT: Okay.

MR. PITTS: All right.

BY MR. PITTS:

Q. Now, where was Mr. Bursey when he asked Agent Abel why he was being arrested, but the other folks on

Appendix 95

the south side of the airport — the hanger side of Airport Boulevard were not being arrested?

A. I — I don't remember.

Q. You do remember hearing Mr. Bursey ask —

A. I do remember him asking that, yes.

Q. In fact, you reflected that in your statement that you have?

A. Yes, sir.

Q. Okay. But you don't remember if it was what we are calling site 1, which is the hanger side, or site 2, which was the other side by the stop sign?

A. And what was the question again?

Q. When - where was Mr. Bursey when he asked the question, "Why am I being arrested, but the folks on the hanger side are not being arrested?"

A. He was either —

Q. Yeah, that would be helpful, thank you.

A. He was either here or here, but I don't remember which.

Q. Either here or here, being either in the grassy part -

A. The grassey area between the Doolittle Hangar parking lot



Appendix 96

\* \* \*

there”?

A. It's always important to me at an event to make sure that the job I do is done right. And we were trying to assist Mr. Bursey, and I feel went beyond that in helping him understand that he was in a secure area and that he — we gave him options of what he could do. And he did not choose to do anything other than be arrested. He did not want to leave the area.

Q. And none of those options included telling him where the secure area ended, did it?

A. No, sir. But there is no reason for us to tell him that because of the security of the president.

Q. Telling Mr. Bursey that 101 yards up the avenue would somehow threaten the president?

A. I can't answer — I don't —

Q. Well, I didn't understand what you said about helping him out to know where the restricted zone ended wasn't one of your options because somehow that wouldn't be protecting the president. That's what I thought I heard you say. If I didn't hear it right, tell me what you said.

A. I haven't eaten today, my son had surgery and I have got the shakes right now. Can I -

THE COURT: Need to take a break?

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THE WITNESS: Yes.

MR. PITTS: That will be fine.

\* \* \*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION

UNITED STATES OF AMERICA,	)	Cr. No. 3:03-309
	)	
VERSUS	)	Columbia, S.C.
	)	November 12, 2003
BRETT BURSEY,	)	
	)	
Defendant.	)	
<hr/>	)	

VOLUME II  
TRANSCRIPT OF NON-JURY TRIAL  
BEFORE THE HONORABLE BRISTOW MARCHANT  
UNITED STATES MAGISTRATE JUDGE

Appearances:

For the Government:      JOHN BARTON, ESQ.  
Assistant U.S. Attorney  
1441 Main Street, Suite 500  
Columbia, S.C. 29201

For the Defendant:      LEWIS PITTS, JR., ESQ.  
1030 Carolina Avenue  
Durham, N.C. 27705

C. RAUCH WISE, ESQ.  
305 Main Street  
Greenwood, S.C. 29646-2757

Court Reporter:

Gary N. Smith, CM  
1845 Assembly Street  
Columbia, S.C. 29201  
(803) 256-7743

STENOTYPE/COMPUTER-AIDED TRANSCRIPTION

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\* \* \*

traffic on both sides.

And he was advised a couple of times where the demonstration area was, he didn't — he didn't go. And three other people showed up, and they were told, and they left —

Q. What were they told?

A. The same thing. Where the demonstration was, and if they stayed, they would have to leave.

Q. And you were pointing here on this gray area, this Tarmac area about where people had been in line when you first arrived, and Mr. Bursey was on the hanger side of Airport Boulevard in this grassy area?

A. Uh-huh.

Q. Did you see people here waiting to get in the hanger?

A. Yes.

Q. How about when Mr. Bursey crossed Airport Boulevard and was cater-corner across at the stop sign, were there people in that area?

A. Just for a few minutes, and then they were blocked off up here.

Q. And you are pointing to the west side of the chart?

A. Right. And then there was nobody in that area when he — when I arrested him.

Q. And why did you arrest him?

A. Because that was deemed a secure area and he had to leave because the president touched down.

\* \* \*

A. No.

Q. Do you know whether or not the trespass — the state statute requires a person to be on private property without permission?

A. At that time I did not.

Q. Was there any consultation amongst the people that were there with you about what citation or summons to issue Mr. Bursey?

A. No.

Q. So, that was totally your decision?

A. No, sir.

Q. Whose decision —

A. I communicated with my captain and he advised me of the charge.

Q. And that's Captain Morrow?

A. Correct.

Q. Was that while you were on the way there in your car or once you —

A. No, sir, afterwards.

Q. Sir?

A. Afterwards. I advised him that he wouldn't leave.

Q. And you consulted with Captain Morrow?

A. Dh-huh, yes.

Q. And he told you to use a trespass citation —

A. Yes, sir.

Q. — summons?

A. (Nods head in the affirmative).

Q. And what ultimately happened to that charge?



A. Well, I dismissed it.

Q. And do you remember when that was?

A. After — after the Secret Service charged him.

Q. After the Secret Service charged him or before?

A. After.

Q. Okay. And when you dismissed that charge, did you — or prior to dismissing, did you have any conferences with the federal prosecutor or the federal officials?

A. Yes, sir, they came out and talked to me.

Q. And who was it that came out and talked to you?

A. Was it John?

Q. Mr. Barton —

A. Mr. Barton, yes.

Q. — sitting here at the table. Okay. Anyone else?

A. I believe Lee came out one time.

Q. Agent Lee?

A. Agent Lee, yes.

Q. Okay. And did you then consult with anybody in the solicitor's office, the state solicitor — South Carolina Solicitor's office about the charge?

MR. BARTON: If Your Honor please, I question the relevance of this. I mean, I think we understand it was

\* \* \*

A. There were a number of — a number of people over there, and I guess they were waiting to go into the — there was a crowd on that side of the roadway.

Q. What about the side of the road where you were, was there a crowd down there?

A. After I crossed?

Q. Right.

A. There was.

Q. All right. How long did you stay there talking to the SLED agents across the road?

A. Less than five minutes, more than two.

Q. Did you see Mr. Bursey be arrested?

A. I did from across the street.

Q. Excuse me?

A. I did. Yeah, from across — across the street.

Q. Did you see him placed in a van or a wagon of some sort?

A. That's correct.

Q. All right. Where were you when he was placed in the van?

A. Probably in the grass. I had left the — I had left the officers, the SLED officers, and I was standing in that grassy area.

Q. All right. And that's the grassy area again on the southwest corner of that intersection?

A. That's correct.

Q. After he was arrested, what did you do?

A. I went to Jerry Rudolph's car.

Q. Yes.

A. And I drove — drove home.

Q. All right. Did you get the keys from Mr. Rudolph?

A. I did.

Q. And what route did you take driving home?

A. I -- and again, I don't know the road. I did not come down Airport Boulevard, I went around the back way, around on the other side of the Midlands Tech campus and came out on 302 off of Boston Avenue.

Q. Now, the whole time that you were there talking to Mr. Bursey and going back across the road and talking to the SLED agents, did anyone ever ask you for a ticket?

A. They did not.

Q. Did anyone ever ask you for identification?

A. They did not.

Q. Did anyone ever ask you what you were doing there?

A. They did not.

MR. WISE: Thank you. Answer any questions that Mr. Barton may have.

THE COURT: Mr. Barton.

MR. BARTON: Just a moment, Your Honor.

I don't have any questions, Your Honor.

THE COURT: Thank you, sir, you may step down.

MR. WISE: Call Ms. Sanders.

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Q. And what route did you take?

A. I came in — I came the city way and took the — I'm sorry, I'm very bad when it comes to highway numbers. But I took the route that comes directly into the airport through I think it's Cayce.

Q. Okay. You came in more or less the back way?

A. Is that considered the back way?

Q. I don't know. Did you come in the main entrance or —

A. I came in the main entrance,

Q. Okay. Was that Aviation Boulevard?

A. Yes.

Q. Okay. When you came in Aviation Boulevard, did anyone stop you?

A. No.

Q. Did anyone ask you for a ticket or anything?

A. No.

Q. Where did you park?

A. I had to — I had to go around — I came onto the airport on Airport Boulevard, and I came around to the — in front of the Doolittle terminal.

Q. Okay.

A. And right in front of the Doolittle terminal is another street that turns to the right. I turned to the right and made a complete circle around the block. I did that several times.

Q. All right. And looking at Government's Exhibit Number 1,

\* \* \*

A. And — but that was about the time that — there was a debate going on, and the police were trying to get us to leave.

MR. BARTON: Your Honor, please.

MR. WISE: He's just saying there was a debate going on.

MR. BARTON: I believe he was about to tell us what the police told him, Your Honor.

MR. WISE: Well, Your Honor —

THE COURT: Well, if the police told them to leave, if he can't tell me that, how am I supposed to figure out what he's doing?



MR. BARTON: Judge, I mean, that's his problem to prove his case.

MR. WISE: Well, Your Honor, if the police told him to leave, it's obviously — if it's because of the sign obviously it impacts the facts of the case in this —

THE WITNESS: He actually didn't tell me to leave, he told me I couldn't be there with a sign.

BY MR. WISE:

Q. Okay.

A. I gave up — at the point at which the — at the time the police officer with the lapel said, "Arrest him," and they — at that point they said get out the cuffs. And I gave up my sign —

THE COURT: You are talking a little fast for me, I —

THE WITNESS: At that point when the policeman with the lapel said, "Arrest them —"

THE COURT: Arrested Mr. Bursey?

THE WITNESS: No, they said, "Arrest them." We were both holding signs. I gave up my sign at that point, and they left me alone and they arrested Bursey.

THE COURT: Oh, you thought they were going to arrest you?

THE WITNESS: At the time I was afraid they were going to arrest me. But I gave up my sign and they didn't.

BY MR. WISE:

Q. So, after — after you gave up your sign?

A. We put the signs in the car. The car had stopped there and Brett gave me his keys. When they started arresting him, he gave me his car keys.

Q. All right. And were you sitting — where did they take Brett?

A. They took Brett across the road to the other side, which would be this side, on the hanger side. And they brought in this wagon, was a paddy wagon, I guess.

Q. Where did you go? Did you see him get placed in the wagon?

A. Yes, I did.

Q. Where did you go after he was placed in the wagon?

A. Well, Harry had already — at the point when they first started threatening us, Harry said he couldn't stay because of his — his security clearance, he might lose it if you are arrested. So, he left and went down Airport Boulevard, but he came with me. And so I had to go back down Airport Boulevard. I walked down — I went away and I came back —

Q. And when you came back, when you say you came back, what route did you go coming back?

A. Well, I went part of the way down the airport road and I came back and I stood there with all the other — there were still a lot of people around.

Q. Okay.

A. And I stood there and watched them put him in the thing. And then I gave my — I went to the — I met Harry and I went back towards the airport. Met Harry and gave him my keys.

Q. Okay.

A. And then I came back again and crossed — • came back and crossed over the road and cut through the same area where we were before.

Q. Right.

A. And nobody bothered me through any of this time after I gave up my sign. I crossed the road and I walked back to where Brett had left his car. He told me where it was parked. He parked on the upper road going back, to the right, and I went back to his car.

Q. All right. So, after Mr. Bursey was arrested, where did you go in relation to that intersection?

A. After he was arrested is when I went across the street to my car — to Bursey's car on the other side.

Q. Where did you — can you show us on that diagram in State's Number 1 about where it was that you met Mr. Rogers?

A. It was back here — it was back here in the back.

Q. It would be on the left side of that —

A. On the left side. And I'm not sure, I don't remember just how far it was, but I had to give him my keys.

Q. So, you gave him your keys at that point?

A. I gave him my keys so I could go back. And then he left in my car.

Q. And then you did what?

A. And I went to — I went back across here and crossed the intersection, went back to —

Q. The intersection of the road that goes straight up?

A. Yeah, the same intersection.

Q. When you walked back through that intersection —

A. Yes, sir.

Q. — after Mr. Bursey was arrested, did anyone stop you?

A. No, no one stopped me.

Q. Did anyone ask you for a ticket?

A. No one asked me for anything.

Q. Did anyone ask what you were doing there?

A. No, no one asked me anything.

\* \* \*

law enforcement people. When I crossed the road, they followed me. The woman I later found to be Agent Abel was getting more strident about her insistence that X couldn't be there, I had to go to the free speech zone.

And after a few minutes, probably two or three or four, Mr. Rudolph and Ms. Sanders and Mr. Rogers showed up, and we were discussing amongst ourselves what we should do.

I had — in my mind then I was reflecting on the fact that we had just been through similar scenarios in two different cities where they told us the same thing, and that we basically found a place that we felt was out of the way to accommodate their concerns and ours, and they left us there. And I'm volunteering to Agent Abel, "I will go back this way some more, I will move back this way towards Midlands Tech."

Q. Verbalize what you are describing —

A. "I will go north on Lexington Avenue towards Midlands Tech some distance, is that okay? We will move. If we can't be here, we will move there."

THE COURT: North on Lexington Avenue?

THE WITNESS: Sir?

THE COURT: North on Lexington Avenue, right?

THE WITNESS: Moving north on Lexington.

THE COURT: Right.

A. And Agent Abel said, "You can't be anywhere but the free speech zone." I had — I mean, there was no option, there was

\*\*\*

A. And Virginia and Harry and Jerry had been dispersed, they were — they were leaving. And the police brought me across Airport Boulevard and there was a paddy wagon parked here. And I recall very distinctly saying some — probably something fairly inane to the people that were in line about their civil rights being threatened.

And they were — the paddy wagon was parked here and there were people queued up as close as from me to the wall, all the way down to here, and all the way back here, running down to Doolittle Hanger, which I believe is 200 yards, and back this way, many

of them holding signs that were expressing their support of the republican candidates.

And they put me in the paddy wagon and drove me to — I can't quite tell where I was. They had a police area where all the police cars and the extra police were, and they drove me there.

And I know it was somewhere in this area, because I saw the president about — I was probably in the paddy wagon for probably 25 minutes before I saw the president's motorcade come into frame and him go into this building here.

Q. Let's go on back just a few minutes in time when you were back on the north side of Airport Boulevard and being told by Officer Campbell that you would be arrested for trespass if you didn't either leave or put the sign down. Did anybody advise you that you were facing any federal criminal charges?

A. No, sir. It was real clear that I — I interrogated the arresting officer and he said I was going to be charged with trespassing on airport property.

Q. Did you have any intent at that time to violate a federal criminal statute concerning a restricted zone for the president?

A. It didn't cross my mind. I was unaware of such a statute or that I was liable of violating it.



Q. Did you have any willful mental intent to disregard or disobey any law that was a legitimate law at that point?

A. No, sir. I think I had done everything a responsible citizen could do. I mean, I communicated with the police, I already said, a week before. And I did not go there with any intent of being arrested.

I did not willfully and knowingly enter into an area that I have heard today was a federally restricted zone. I was unaware of the fact that it was a federally restricted zone.

Q. And prior to being confronted by the officers, which I will include the Secret Service officer, in the grassy area on the hanger side of Airport Boulevard, had you been screened or checked for tickets?

A. No, sir.

Q. Checked for I.D?

A. No, sir.

Q. Had you been told as you entered any of the — and you were

[DEFENDANT'S EXHIBIT 6]

SOUTH CAROLINA LAW  
ENFORCEMENT DIVISION

MARK SANFORD  
*Governor*

ROBERT M. STEWARD  
*Chief*

TO: Chief Robert M. Stewart

FROM: Lt. Tamara P. Baker

RE: President George W. Bush Visit  
SLED Case No. 42020E93

DATED: February 19, 2003

Pursuant to a request from the U. S. Secret Service, SLED was requested to assist with security for President George W. Bush's visit on October 24, 2002. SLED supplied special agents to staff necessary assignments. This writer was in charge of putting together SLED's Operational Plan for this event, which included advance work at the various sites for positioning of our agents.

During the planning stage, this writer had a meeting with Chief Stewart, Captain Ben Thomas and Major McKinley Weaver. During this meeting Major Weaver said he had talked with Brett Bursay. He stated Brett was planning on attending President Bush's event to "protest". I asked Major Weaver to let Mr. Bursey know that he should go to the general public area. I also told him this was a ticketed event and everyone

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must have a ticket in order to enter the site. Although it was open to the public, you had to call and receive a ticket.

On the day of the visit, October 24, 2002, this writer was assigned to work with Special Agent Holly Able, who was from the USSS office in New York. We were assigned as the ID team located at the Doolittle Hanger at the Columbia Metropolitan Airport. I arrived at approximately 7:30 am to the Doolittle Hanger and met with S/A Able. The public began arriving to enter the event and a line quickly formed. Agent Able and myself began walking the area around the hanger and watching the crowd in line. An individual, who I recognized to be Brett Bursey, walked up to the grassy area between the parking lot, where the public was in line, and the road with various signs. He dumped the signs on the ground. As we approached him, he picked up one of the signs. He was asked what he was doing and he said he was demonstrating his free speech. Special Agent Able identified herself to Mr. Bursey as a Special Agent with the United States Secret Service and told him this was a secure area and he would have to leave. He stated he was told by SLED that he could be there. I informed Mr. Bursey of who I was and where I ~~worked~~ and asked him who at SLED told him he could be there. He stated that Major Weaver had told him he could be there. I informed him that I was aware that Major Weaver had talked with him and what Major Weaver had told him. I informed him that Major Weaver had related to him he would be welcome to go to the general public area, but that was not in fact where he was standing. He said he was going to stay right there. It went back and forth

like this for several minutes before he said okay I'll leave. He walked across the street to the corner and dumped his signs on the ground there. He said he was going to stay there until the other people he was going to meet arrived. When the other individuals arrived, Mr. Bursey talked with them for several minutes. Mr. Bursey was again told by Special Agent Able he would have to leave the area, because he was still in the secure area. Mr. Bursey said we would have to arrest him. Lexington County Sheriff's Office brought an arrest van up to the area where we were located. Special Agent Able told Mr. Bursey he had a choice of either leaving the area or being arrested. Mr. Bursey asked why we weren't arresting everyone in the line waiting to go inside the event. We told him they had tickets to get in and if he had a ticket he also had that option. He was very belligerent and would not listen and kept saying he had sued once and appealed and won. He was just waiting on the chance to do it again. He was given one last opportunity to leave the area or be arrested. His friends decided they did not want to be arrested and would go to the general public area. Mr. Bursey was arrested and taken out of the secure area prior to the arrival of the President.

This writer notified Chief Stewart and Captain Thomas of the events as they were occurring. If I may be of further assistance to you in this matter, please do not hesitate to contact me.

Respectfully submitted,

/s/Tamara P. Baker

Tamara P. Baker

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Lieutenant  
S. C. Law Enforcement Division

tpb

cc: S/ A Paul Lee - USSS

[COURT EXHIBIT 1]

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACORN	:	CIVIL ACTION
	:	
v.	:	
	:	
THE CITY OF	:	
PHILADELPHIA and	:	
THE UNITED STATES	:	
SECRET SERVICE OF	:	
THE DEPARTMENT OF	:	
HOMELAND SECURITY	:	NO.

ORDER

AND NOW, this [ ] day of July 2003, based on the Verified Complaint and the oral application for a temporary restraining order, the Court hereby ORDERS the defendants to permit plaintiffs to demonstrate peacefully at the corner diagonally across the street from the Treasury Financial Facility Building, which is located at 13000 Townsend, no farther away from the Treasury Financial Facility Building than other demonstrators.

/s/ John P. Fullam

John P. Fullam, Sr. J.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACORN,	:	
	:	
Plaintiff,	:	CIVIL ACTION NO.
	:	03-4312
THE CITY OF	:	
PHILADELPHIA,	:	
THE POLICE	:	
DEPARTMENT OF	:	
THE CITY OF	:	
PHILADELPHIA, and	:	
THE UNITED STATES	:	
SECRET SERVICE OF	:	
THE DEPARTMENT OF	:	
HOMELAND SECURITY	:	
	:	
Defendants.	:	

VERIFIED COMPLAINT

INTRODUCTION

Plaintiff, a nationally recognized organization dedicated to dedicated to empowering poor people and bring to the Nations attention, the plight of those who are powerless, have been prevented by the City of Philadelphia and the United States Secret Service from entering a sidewalk, which is immediately opposite the building which President Bush is touring this morning, even though that same sidewalk was open to individual wishing to support the President. This law enforcement action not only violates the United States'



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Constitution prohibition against viewpoint discrimination as well as this Court's Order permitting them to demonstrate on the sidewalk opposite the Treasury Financial Management Facility at 13000 Townsend Road.

### Jurisdiction

1. As Plaintiff seek to vindicate rights protected by the First and Fourteenth Amendments of the United States Constitution and 42 U.S.C. Section 1983, the Court has jurisdiction of this civil action pursuant to 28 U.S.C. Sections 1331 and 1343(a)(3) and (4). Pursuant to 28 U.S.C. Sections 2201 and 2202 this Court has jurisdiction to declare the rights of the parties and to grant all further relief found necessary and proper.

### Parties

2. Plaintiff, ACORN, is a nationwide organization the Association of Community Organizations for Reform Now, is the nation's largest community organization of low and moderate-income families, with over 150,000 member families organized into 700 neighborhood chapters in 51 cities across the country. Since 1970 ACORN has taken action and won victories on issues of concern to our members. Our priorities include: better housing for the first time homebuyers and tenants, living wages for low-wage workers, more investment in our communities from banks and governments, and better public schools. We achieve these goals by building community organizations that have the power to win changes—

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through direct action, negotiation, legislation, and voter participation.

3. Defendant, CITY OF PHILADELPHIA, is an incorporated municipality of the Commonwealth of Pennsylvania, which may be served by delivering process to the Honorable Nelson Diaz, City Solicitor, whose office is located at City Law Department, One Parkway, 1515 Arch Street, Philadelphia, PA, 19102-1595.

4. Defendant, THE POLICE DEPARTMENT OF THE CITY OF PHILADELPHIA, is responsible for all law enforcement activities within the City of Philadelphia.

5. Defendant, THE UNITED STATES SECRET SERVICE OF THE DEPARTMENT OF HOMELAND SECURITY, is the federal agency charged with, among other assignments, protecting the President of the United States.

### FACTS

6. At approximately 10:30 am today, July 24, 2003, President Bush will be touring the Treasury Financial Facility at 13000 Townsend Road, where some of the 25.4 million checks reimbursing parents pursuant to the newly enacted Child Tax Credit, will be printed.

7. In an effort to call attention to the failure of the President and the House Republican leadership to broaden that tax credit to the working poor, ACORN

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called upon its members to demonstrate outside the facility during the President's visit.

8. In anticipation of that event, ACORN held a series of discussions with both the Secret Service and the Civil Affairs Unit of the Philadelphia Police Department requesting the right to demonstrate on the public sidewalk across the street from the Treasury Financial Facility.

9. On July 23, 2003, both ACORN and the Undersigned attorney were informed by both officers of Civil Affairs and agents of the Secret Service that neither ACORN nor any other groups or individuals would be permitted access to the sidewalk across the street from the Treasury Financial Facility during the President's visit.

10. It was on this basis that ACORN was willing to hold its demonstration on the corner of the sidewalk diagonally across the street from the Treasury Financial Facility building. This area, however, would make it less likely that the President would observe ACORN when entering and leaving the Treasury Financial Facility.

11. This morning, July 24, 2003, only moments ago, when setting up for their demonstration, ACORN and its members observed individuals campaigning their support for President Bush, entering the sidewalk immediately in front of the Treasury Financial Facility building.

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12. Defendants took no steps to remove the President's supporters.

13. ACORN and its members are being subjected to viewpoint discrimination by Defendants

14. Absent this Court's immediate Order permitting ACORN access to the street in front of the Treasury Financial Facility building, ACORN will suffer an immediate and irreparable injury.

15. Additionally, within the last few minutes, ACORN has now been pushed by Philadelphia Police, from the corner diagonally across the street from the Treasury Financial Facility building to an area away from the intersection at Townsend and McMulty (see attached diagram.)

### Causes of Action

16. In denying or refusing to permit Plaintiff access to the sidewalk immediately across from the Treasury Financial Facility because of the viewpoint of their political message, Defendants violated and continue to violate Plaintiffs' First Amendment rights to peacefully assemble and speak, which rights are guaranteed by the Fourteenth Amendment and for which remedies are provided by 42 U.S.C. § 1983.

17. In denying or refusing to permit a permission to be on the corner of Townsend and McMulty, the Defendants have violated this Court's Order in *Pledge of Resistance v. We the People 200*, et al.

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Relief

Based on the foregoing, Plaintiffs respectfully pray that this Court will:

A. Grant Plaintiffs preliminary and permanent injunctive relief requiring Defendant, their subordinates, employees, agents and those acting in concert with to immediately give access to the corner diagonally across from the Treasury Financial Facility building on July 24, 2003.

B. Grant Plaintiffs such other relief as they may be entitled to, including damages; and

C. Award Plaintiffs reasonable attorney's fees and costs.

Respectfully submitted,

---

Stefan Presser, Esq.  
PA Attorney No. 43067  
Legal Director  
American Civil Liberties  
Union of Pennsylvania  
125 South Ninth St, Suite 701  
Philadelphia, PA 19107  
(215) 592-1513 x 116

ATTORNEY FOR PLAINTIFFS

[COURT EXHIBIT 2]

BEFORE DISTRICT MAGISTRATE  
SHIRLEY R. TRKULA

IN AND FOR  
ALLEGHENY COUNTY, PENNSYLVANIA

---

COMMONWEALTH OF PENNSYLVANIA, )

Plaintiff, )

-vs- )

WILLIAM R. NEEL, )

Defendant. )

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TRANSCRIPT OF PROCEEDINGS

held before District Magistrate Shirley R. Trkula,  
923 Fifth Avenue, Coraopolis, Pennsylvania  
15108, commencing at 10:38 a.m. on Thursday,  
October 31, 2002.

APPEARANCES:

On behalf of the Defendant:

THOMAS J. FARRELL, ESQ.  
Thieman & Farrell  
2312 Koppers Building  
436 Seventh Avenue  
Pittsburgh, Pennsylvania 15219

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\* \* \*

We explained to them that --

MAGISTRATE TRKULA: I can't see it.

THE WITNESS: We explained that they had to go there or they would be detained and arrested.

MR. NEEL: That --

MAGISTRATE TRKULA: You don't say anything.

THE WITNESS: But anyways, we continued to, you know, ask them to go in there. They refused.

They were arrested at that point. They were taken right into the adjacent firehouse, and myself and Detective Mett sat there with Mr. Neel and Mrs. Neel until the President was done and he left town.

MAGISTRATE TRKULA: Okay.

THE WITNESS: That's my understanding of the situation. That's all really I have to say.

MAGISTRATE TRKULA: Okay. So you wrote him up under disorderly conduct.

THE WITNESS: Yes, I just issued a citation for disorderly conduct.

MAGISTRATE TRKULA: Okay.



---

CROSS-EXAMINATION

---

BY MR. FARRELL:

Q. Detective, you said you were instructed that protesters had to go into this fenced-in area?

A. Yes, sir.

Q. And by protesters, what do you mean?

A. Basically my understanding, people exhibiting themselves as protesters, in particular carrying signs, and readily apparent as protesters. I can't describe that any further than that.

Q. I'm sorry, maybe I --

A. People that were there making a statement pretty much against the President and his views.

Q. Okay. So by protesters, you mean people with signs critical of the President?

A. Yes. Yes, sir.

Q. And there were also people walking around outside Memorial Field, weren't there?

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A. There were lots of people traveling along the path to go to the podium area.

Q. The podium area was south of Memorial Field?

A. Yes, sir. Right by the carpenters union.

Q. Okay. And the people who were walking outside that fenced-in area, did that also include folks with signs supportive of the President?

A. It could have, but I really didn't notice if it did or not. I didn't really take notice of all the signs.

Q. All right. In terms of people you selected to direct behind the fence, it was only folks with signs critical of the President?

A. They were pretty much the only signs I saw, sir.

Q. All right.

A. I didn't really notice any supportive signs of this nature or anything like that.

Q. Weil, how about your directions - I'm sorry.

A. I'm not saying there wasn't any, but -

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Q. Uh-huh. But your directions were only those folks with signs critical of the President needed to be in the protest area?

A. Yes, sir, people as I would understand to be in protest.

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[COURT EXHIBIT 6]

St. Petersburg Times ONLINE TAMPA BAY

**Protesters kept at a distance; three arrested**

By KEVIN GRAHAM and ANGELA MOORE

© St. Petersburg Times, published June 5, 2001

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TAMPA – People who parked in the assigned lots and walked to Legends Field to see President Bush probably didn't see many protest signs.

TAMPA – People who parked in the assigned lots and walked to Legends Field to see President Bush probably didn't see many protest signs.

That's because the 150 or so protesters were kept in a cordoned-off "First Amendment zone" about a half-mile away, at the corner of Dale Mabry Highway and Tampa Bay Boulevard. The boisterous group waved signs that read "SAVE OUR GULF" and "Bush oil and our water don't mix."

Inside the ballpark, three demonstrators carrying anti-Bush signs were arrested after they refused to leave, Tampa police spokeswoman Katie Hughes said.

Janis Marie Lentz, 55, of New Port Richey, Mauricio Rosas, 37, of Tampa, and Sonja Haught, 59, of Clearwater, were each charged with trespassing after warning, police said. Haught also was charged with

disorderly conduct because police say she tried to resist arrest.

Walter Sorenson, 81, of New Port Richey was knocked down after police shoved one of the arrested women, he said. He suffered a cut on his head.

Sorenson said he was carrying an anti-Bush sign too, but put it in his pocket when told to.

"I asked them (security) how come everyone else could wave Bush signs and we couldn't have our signs," Sorenson said. "They said, 'You don't make the rules. We make the rules.' "

Hughes said police were only enforcing Secret Service policy.

"They said that you can't be within eyeshot of the president with those signs because it's a security issue," Hughes said. "Most of this is bigger than us. ... We work within their parameters."

A half-mile away, demonstrators shared disgust for the Bush administration and plenty of non-sanctioned signs. They included Florida Democrats, the Sierra Club and other environmentalists, the National Organization for Women, gay and lesbian alliances, and student groups.

A 2,000-pound oil derrick display with a postcard-like background of Florida's coastline sent a message: "Oil derricks can destroy a pretty picture," said Bob Poe, chairman of the Florida Democratic Party.

## Appendix 134

"The Democrats are out here to ask (President) Bush to keep his promises," Poe said. "He promised not to drill off the shore of Florida. This administration seems to be hellbent on breaking that promise."

Beth Connor, conservation organizer for the Sierra Club of Florida, said, "I think (the Bush administration) is going to realize they picked the wrong fight. The people of Florida are united on this issue. They have kicked over an ant pile – and we are fire ants."

Protester Matt Sullivan said he disagreed with the idea of keeping the dissenting voices out of the president's earshot.

"We're all American citizens," Sullivan said. "We shouldn't allow our voices to be segregated."

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[http://www.sptimes.com/News/060501/news\\_pf/TampaBay/Protesters\\_kept\\_at\\_a\\_.shtml](http://www.sptimes.com/News/060501/news_pf/TampaBay/Protesters_kept_at_a_.shtml)

Appendix 135

STATE OF MICHIGAN  
IN THE EIGHTH DISTRICT COURT  
FOR THE COUNTY OF KALAMAZOO

PEOPLE OF THE STATE OF MICHIGAN,

v

Case No.: 01-05340 SM

ANTOINE JENNINGS,

Defendant.

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EXCERPT OF JURY TRIAL

(TESTIMONY OF WESLEY CARPENTER  
AND MICHAEL SMITH)

BEFORE THE HONORABLE  
ANN L. HANNON, DISTRICT JUDGE

Kalamazoo, Michigan - Friday, August 17, 2001

APPEARANCES:

For the People: MS. MARLA T. BUCKLES,  
(P6263S)  
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For the Defendant: MR. JAMES B. FORD, (P26997)  
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Appendix 136

RECORDED BY: Ms. Judy Palmer, CEO 6735  
Certified Electronic Operator

Transcribed by: Ms. Denise Bowers, CER 4106  
Certified Electronic Recorder  
(616) 383-8662

**8TH DISTRICT COURT - KALAMAZOO COUNTY**

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of the criminal division for a number of years,  
and, in 1991, I became captain of public safety,  
and I now run the parking and service division.

Q. And you are, sir, an employee of Western Michigan?

A. Yes.

Q. And you are authorized by the university to act as a law enforcement agent for them?

A. Yes.

Q. And were you employed in your present capacity on March - in the month of March 2001?

A. Yes, I was.

Q. I'd like to draw your attention to March 27th, 2001. Can you tell the jury what was happening on the campus of Western Michigan at that time?

## Appendix 137

A. That was the day that President Bush was coming to campus to visit and attend a dinner in the recreation center that afternoon.

Q. And what was your assignment on this date?

A. I was in charge of the outside areas, all the public areas surrounding the recreation center, and in charge of all the officers that were assigned to that area.

Q. Now, were you working with any other law enforcement agencies in preparing for President Bush's arrival?

A. Yes.

Q. And what agencies were those?

A. The United States Secret Service and their advance team, working from the White House.

Q. And what did you and the Secret Service do to prepare for the President's arrival?

A. They arrived approximately three days prior to his arrival, and we set up the established area surrounding inside and outside of the facility for the security of the arrival of the President. They established areas that public were not allowed to enter. They established areas for demonstrators. They established areas for the press, the news media and the public who had — ticket holders to actually enter the venue.

## Appendix 138

Q. And, without going into the vast instructions, what were the reasons why you were given these specific instructions?

A. For the security of the President so that there were no threats or any action taken against him or his motorcade.

Q. Now, have other officials visited Western Michigan?

A. Yes.

Q. And what other officials during your tenure have come to that university?

A. Former Vice President Bush, Sr., was on campus at one time. Candidate George Dukakis, I believe his name was, was there. There have been several other state and federal persons.

Q. And, during these visits, are similar protocols taken?

A. Yes.

Q. And you indicated earlier in conjunction with the Secret Service and the White House, Western Michigan did establish a demonstration area for students?

A. Yes.

Q. Now, Officer, I'm going to move up a map that I have of the Western Michigan campus. This is marked as People's proposed Exhibit Number —

I can switch it around to 1.

THE COURT: Well, let's - let's leave it as marked.

MS. BUCKLES: Okay.

THE COURT: This is 2.

MS. BUCKLES: Two. Okay. Thank you, your Honor.

BY MS. BUCKLES:

Q. Now, is this — does this fairly and accurately represent Western Michigan University's campus?

A. Yes, it does.

MS. BUCKLES: Can you guys see that — the jury?

BY MS. BUCKLES:

Q. Now, could you come out of the witness box? Can you show us where the demonstration area was located? There's — I'm sorry. There's pens I put in there for you. Sorry.

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